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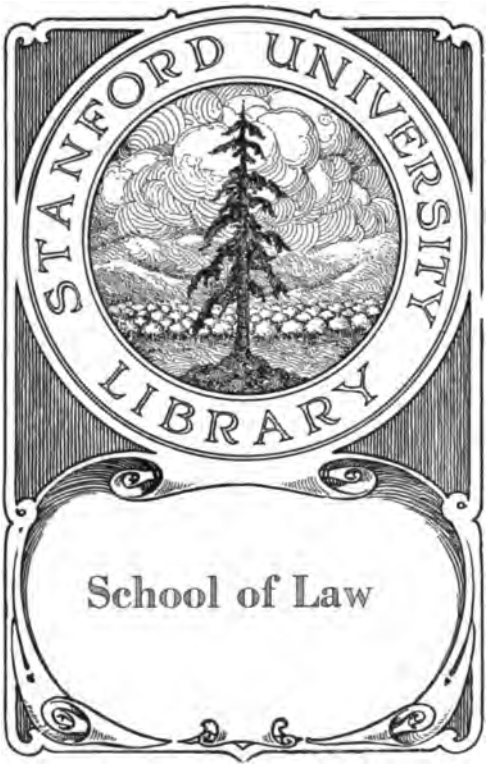

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WE send with this number the sheet almanac, a welcome addition, as of old, to the literature of a lawyer's office. The volume for 1890 closed with the usual Index and Table of Cases, etc. There was added a new feature, to wit, a Table of the Statutes referred to in the volume, with the particular section on which some point was decided, or construction placed by the courts. There is also a Table of the Consolidated Rules of Practice, of a similar character. We feel that this addition to the index will be of practical value, enabling the practitioner to find the latest decision on any of the sections or rules given.

IN referring to the index we are reminded of a clipping from the *London Globe* a couple of years ago, which we reprint below, in the hope that its perusal may serve as an excuse for any shortcoming which our readers may find. The extract reads as follows:—"It would be difficult to discover an intellectual quality which the index-maker does not require. He must have a high degree of imagination in the truest sense—enough to put himself in the place of every possible student, for every possible purpose, so as to know, by a sort of instinct, what each would require. He must have the logical faculty that knows what to omit as well as what to insert; and he must know the work he deals with, not merely with mechanical precision, but with intelligent mastery. Indeed, the ordinary index-maker is in this unfortunate position—he requires qualities that would place him above his work, and yet he cannot do his work efficiently without them. The result is that there is scarcely such a thing as a really good index in the world; nor will there be until the truth is recognized of the fact that the production of more indexes to books, and not more books themselves, is the most practically useful work in which any trained scholar can engage. A good and comprehensive index should be worth, to its compiler, the number of its words in gold; and its achievement should imply fame." We wish it were possible for us to attain to this high standard.

CROSS-EXAMINATION.

There is hardly any subject connected with the administration of justice which, at times, demands more consideration than that of the cross-examination of witnesses.

To anyone who is a regular attendant at the trials of jury cases, it will be perfectly obvious that the time taken up with the cross-examination of a witness is very much out of proportion to that on his examination in chief, and, more-

over, that the length of the re-examination is very often in proportion to that of the cross-examination.

Now, if the cross-examination of a witness always resulted in some substantial benefit to the opposite party, it might fairly be said that no time was unnecessarily lost, and that counsel was not unreasonable in taking up the time of the court and jury.

It often happens, however, that in such cases much time is unnecessarily wasted—the time of the court, of the jurors, of the counsel, of the witnesses, of the suitors in that particular case, as well as of the suitors in other cases standing for trial, and their witnesses.

Where an old experienced counsel takes a witness in hand for cross-examination he generally devotes himself to one or two particular points, either to get the witness himself to unsay what he has said, or, what is much the same, to make him contradict himself—or to shew out of his own mouth, that, even should he adhere to what he said on his examination in chief, he is unworthy of credence.

In dealing with such a witness a counsel of experience will generally be able to tell, after a few questions, on what line he should continue his investigation. If he sees that the witness is honest in his adherence to what he has already said, he will take care about continuing a course which will make the evidence already given more impressive, and more confirmed in the minds of the jury.

If he sees or suspects, that, though the witness is dishonest, there is no prospect of his being induced, either by the extreme pressure that can be sometimes brought to bear on such a witness, or by tripping him up, to "go back" on what he has said, then counsel will adopt another line—and it is then that great latitude should be, and generally is, given to the cross-examination, even though much time may appear to be thereby wasted.

It constantly happens, however, and it can be seen by attending the sittings of any court engaged with jury cases, that an immense amount of valuable time is wasted by the utterly aimless and unpointed way that a cross-examination is conducted, generally, of course, by young and inexperienced counsel—but, alas! not always. And this is carried to such an extent sometimes that sympathy for the witness is excited, not only in the breasts of the surrounding listeners, but also among the jury; that sympathy extending itself sometimes to that party to the suit, whose witness is being thus treated.

We are aware that in the case of young and inexperienced counsel, we must not look for that mode of conducting a cross-examination which can only be attained to after, perhaps, years of practice, and from a tyro, the proficiency of a master cannot be expected. And so, when we see a youthful counsel engaged in a contest of right and wrong, we must make every allowance for him, in his endeavor to establish and uphold the former.

But when it is evident to everyone that a witness trying to be honest, is subjected to a system of bullying and browbeating, and often of insult, then there should be some way of calling for interposition.

That interposition can only be looked for and can only take place from the court itself, and, we are free to admit, it is sometimes difficult to say when that right should be exercised.

It will be in the memory of many, that the late lamented Chief Justice Moss, after he ascended the bench, seeing the unwarrantable extent to which cross-examinations were carried—often by young counsel who wished to shew their smartness, and to establish a reputation as successful pleaders—interposed on several occasions in a most decided way, declaring that he desired that cross-examinations should be confined within proper bounds. No doubt the same desire exists in the minds of all *nisi prius* judges, but how to carry it out seems to be the difficulty.

Very often interference from the bench brings forth the insinuation from the offending counsel that the rights of his client are being interfered with—very often it results in actually rendering the examination more protracted. For it sometimes happens that counsel appear to forget that a judge is supposed to be impartial, and may be assumed to be so until he shows a bias, and that the effort to protect a witness, or to prevent time being unnecessarily wasted, is the duty, and sometimes the very unpleasant duty, of a judge.

The extreme latitude that was allowed in the Tichborne case seems to have established a precedent which is freely followed. But it would be wise for counsel to consider well, whether the exercise of the right thus conceded is at all times expedient.

The ordinary text-books lay down that even where questions wholly irrelevant to the issue are being asked in order to test the credibility of the witness, judges seldom interfere, trusting to the honor of counsel not to abuse their liberty. But surely when a judge sees plainly that this liberty is being abused, it is not only his right, but his duty, to interfere.

If counsel's brief contains questions to be put to an opponent's witness, it is of course his duty to put them, unless in the exercise of his judgment or his common sense, he see fit to omit them. And if instructed to put given questions with a view of bringing out certain facts and incidents in the witness's life, which will tend to discredit him, he will be justified in putting them. But will anyone say that a long series of random questions, put with a hope of bringing out something which the questioner has no real grounds for supposing exists, is justified?

An aimless and unwarranted cross-examination is a great evil; and "there is another like unto it"—and that is, the constant interruption by the opposite counsel, even when the cross-examination is being conducted in a fair and proper manner.

It is said that in England, the opposite counsel seldom interferes with the cross-examination of his witness—probably upon the ground that if the witness is honest a thorough sifting of his evidence can do no harm, and that any apparent contradictions can be set right on re-examination; while, if the witness is not honest, it will look as if an effort were being made to help him out, and betray, perhaps, an intimacy with "ways that are dark."

If counsel would ever bear in mind that an improper cross-examination—improper in any way—results only in assisting to bring the profession into disrepute or ridicule, in wasting the time of everyone who has any business at the court, and the patience as well as the time of the judge, and at the same time promotes the idea that the intelligence and judiciousness of the counsel himself are at fault—then, indeed, would some of the evils of this life be ameliorated.

GRAND JURIES.

Considerable discussion has taken place from time to time with regard to the question whether grand juries should be retained or abolished. At nearly all of our courts of Oyer and Terminer, the presiding judges have addressed the Grand Inquest upon this point, and in many cases have asked that body for an expression of opinion on the subject. Generally, the answer has been favorable to the retention of the system, and this fact is urged as an argument in furtherance of the views of those who do not desire to see any change made in the trial of criminal cases. A moment's reflection, however, will show that the opinion of grand juries on the question of their own continuance is not entitled to any great weight. As a rule, the jurors are not men accustomed to legal procedure. They have no special knowledge on the subject. Their training and modes of thought are not such as to enable them to give any very valuable suggestions with reference to the functions of a grand jury as part of our criminal procedure, and their information on this head must necessarily be very limited indeed. Add to this that, in most instances, their presentment is prepared by the foreman at the last moment, and we can readily judge of the importance of any opinion professedly given by the jurors, as a body, on a matter involving, for the purpose of a thorough knowledge of it, great experience, much research, and careful, serious reflection.

The views of many of our judges are, we are aware, in favor of the system, but one must not conclude that because the judges express themselves against the abolition of the grand jury therefore it ought not to be abolished. We have the greatest respect at all times and under all circumstances for the opinions of our judiciary, but this is a question which those who, as Crown prosecutors, are practically dealing with grand juries, and who know from actual experience how the system works and is worked, may be permitted with all deference to express a dissenting opinion, and to take issue with abler men, whose position removes them from the level from which the system can be best seen and judged. We are therefore inclined, from the information which we have gathered from various reliable sources, to take a position adverse to that generally taken by the Bench on this point; and whilst we approach the subject with much diffidence, we hope to satisfy our readers that the grand jury is not all that it is claimed to be, and that the administration of criminal justice would not suffer if the venerable institution were abolished.

So far as the origin of the grand jury is concerned, the causes which led to its inception no longer exist, and consequently cannot be urged as a reason for its continuance, nor does a historical review of this venerable system supply us with any arguments in its favor. With regard to the information which can be gained from the writers on this subject, there appears to be considerable obscurity concerning the early history of juries. The grand jury was originally a creature of necessity. There does not appear to have been any regularly constituted tribunal for the trial of criminals, nor was there any provision for the attendance of witnesses, their examination on oath, or any other of the ordinary means now used

for the discovery of facts at the trial. These matters were dealt with, and the present functions of a court and petit jury were performed by the grand jury, composed of men selected from the neighborhood of the occurrence, and supposed to have a personal knowledge of the circumstances. The original function of the grand jury was, therefore, that of a trial jury and witnesses. As one writer puts it, "If a thief were taken in the act, the case was quite clear and no trial was needed." If not so taken, he was tried by "oaths and ordeals at the hundred court." If the grand jurors knew enough of the case personally, they at once decided the issue of guilt or innocence. If they did not know enough to enable them to judge, and the compurgation or oaths failed to satisfy them, then there was recourse to the ordeal, which was of different kinds and was used only as a last resort. The jurors actually tried the cases and were themselves the witnesses, for the simple reason that no other tribunal with similar functions existed. The accusation by a grand jury became practically a conviction. The jurors were, in contemplation of law, the witnesses. Sir James Stephen says: "It was by their oath, and not by the oath of their informants, that the fact to be proved was considered to be established, and the only form of perjury known to the law of England as a crime till comparatively modern times was that form of perjury which was committed by giving a false verdict, and which was punished by the process known as an attaint." The indictment was the accusation presented by the grand jurors on their own knowledge. After several changes in the law had been made, witnesses were introduced before the courts to testify as to the facts of the case under consideration, and the jurisdiction of grand juries became very much curtailed in consequence. The principal reason for the convening of grand juries, namely—the trial of the accused by the peculiar modes then sanctioned as proper and sufficient—ceased to exist, as the final adjudication in criminal matters was gradually assumed by what is now known as the petit jury; but nothing appears to have been done towards abolishing the prior tribunal, although the changes we have indicated materially affected its power and procedure. It continued to exist, just as many other ancient forms and ceremonies, useless in themselves and cumbrous elements in the administration of justice, continue to the present day to exist, because our administrators are, in too many cases, imbued with a feeling of veneration for matters that have nothing but age to recommend them.

The Assize of Clarendon, 1164, and of Northampton, 1176, are amongst the earliest authentic records of the introduction of what was in some respects similar to our present procedure, with the exception of the ordeal of water. The provisions of the Assize of Clarendon are that, in case any one is accused before the justices of our Lord the King of murder, theft, robbery, or of harboring persons committing those crimes, or of forgery or arson, "by the oath of twelve knights of the hundred, or if there are no knights, by the oath of twelve free and lawful men, and by the oath of four men from each township of the hundred, let him go to the ordeal of water, and if he fails, let him lose one foot." The Assize of Northampton added to this the loss of the right hand of the accused, and to abjure the realm and exile himself from the realm within forty days.

These twelve men were originally the accusers instead of the private person wronged, and there is no less an authority than Mr. Justice Stephen, in his admirable History of the Criminal Law, for the assertion that "the system of indictment by a grand jury, which merely reported on oath the rumors of the neighborhood, might, and no doubt often did, work cruel injustice." After a time, the practice of convening what he calls "something like a county parliament," fell into disuse, and the sheriffs gradually adopted the plan of "summoning only a sufficient number of *probi et legales homines* to form a grand jury, and as many petty juries as might be needed." The theory was to summon the county magistrates until twenty-three appeared, but practically the summoning of "good and lawful men," not necessarily magistrates, was held to be a sufficient compliance with the law. This is now the practice of our system of criminal procedure, and it is based entirely on the theories and customs in vogue amongst the early law-givers and dispensers of justice during the Saxon and immediately succeeding periods of English history. All that has been left to the grand jury is the function of preliminary investigation.

Bearing in mind that the original grand jury system was a sort of county council and a local executive body, having an eye to the whole details of local government and the administration of justice or injustice, as the case might be, that the accusation of supposed criminals was only one of its numerous duties, and that to all intents and purposes it has been stripped of its once great power, we may fairly ask whether the shred that still remains might not go with the rest. Other functionaries and other bodies perform the greater part of the work originally assumed by grand juries in a better manner than it was done by them, and parliament of late years, still further encroaching on the functions of the grand jury in giving summary trials and a direct appeal to the court for its judgment of guilt or innocence, has shown itself to be guided by good sense and practical ideas. At any rate, it will be seen from the brief sketch we have given that there can be no argument in favor of the system grounded on its inception or early history; and like all other matters in this utilitarian age, if it has nothing to recommend it save the veneration which comes from the accident of old age, it must, we predict, soon become a fact for historians only.

We come now to the present state of grand juries, and the first questions which suggest themselves are: Is the system in accord with our modern ideas of fair trials? Is the bill found or ignored an independent judgment by a competent tribunal? Is it right that a man should be put in peril by an irresponsible body in his absence? Is not the theory of a secret tribunal entirely opposed to our whole system of legal procedure? Is it a safe tribunal to deal with the reputation or the liberty of a subject? We must not forget that the finding of a bill is of serious moment to the accused. In grave offences he is seldom allowed bail after a bill is found, although six months must elapse in many instances before he can be tried. The mere finding of a bill is also of the greatest consequence to the reputation and future of a person charged with an offence, even if the presiding judge directs an acquittal. It is therefore highly proper to enquire whether, in an important matter like this, we have retained and nourished out of the legal wrecks and deformities of the past, a useful or injurious article.

What is the practical experience in regard to the system? We have no hesitancy in alleging that there are very few grand juries that will not find a bill at the instance of the Crown prosecutor, and there are fewer still who will not ignore a bill on the intimation of the court in charging the Grand Inquest. This is natural. The jurors are principally farmers, with occasionally one or two business men on the panel. They implicitly obey those skilled in the law to guide them, when they think it proper to make enquiries on legal matters. They ask questions, the answers to which materially influence their judgment. But they are not bound to seek for any information, and a friend of the accused on the panel, with a little shrewdness, a little manipulation, may readily succeed in having a bill thrown out which ought to be presented. The evidence may be ingeniously extracted one way or the other, as the examiner is friendly or hostile to the prisoner. There is no limit set upon the mode of conducting a prosecution in the grand jury room. No evidence is allowed to be disclosed outside its sacred precincts. The *modus operandi* remains as if it were a confessional secret. The very oath taken by the jurors protects them, as they are in effect sworn to keep secret what transpires within their chamber. Only one witness is allowed to be present at one time. There is no record made of the evidence given. It is true that witnesses are sworn by the foreman; but if the witness swears to what is untrue, his perjury is practically protected and safely guarded by the veneration which the law has for the system which we are opposing. It is true that if a man swore to a fact in the grand jury room and directly opposite in the witness box an hour afterwards, there is a way of prosecuting him; but it would be so beset with legal points and hoary-headed objections, that a conviction would be almost impossible. Bills are presented to the grand jury on the last day of their session. The jurors are anxious to return to their homes. It is difficult to keep them together when their sitting is prolonged. They are, to a great extent, an independent body. What is the result? A hurried examination of a witness or two, not one-fourth of the facts elicited, a suggestion by an impatient "good and true man" that another day will be lost unless the business can be finished at once, a finding of a bill, and some unfortunate individual is subjected to the caprice of "the strong god, Circumstance," put upon his trial, mulcted in heavy counsel fees for his defence, and acquitted very often before the Crown has completed its case! Surely these are matters which ought to weigh heavily in considering the advisability of retaining this adjunct to our criminal procedure.

A grave objection to the system is undoubtedly that the jury is a secret tribunal. The proceedings are, as is well known, not only conducted in private, but the privacy is sanctioned and bound by an oath which each juror takes after the foreman has been sworn. No question can be raised as to the sufficiency of evidence, or whether there is any evidence at all against the accused. All other findings of every court or functionary can be reversed if there is no evidence to support them. The Grand Inquest alone stands in this respect unique and beyond the reach of the law, and occupies the high position of being answerable to no power, no court and no parliament of the state. Its mistakes cannot

be rectified. The affidavits or statements of grand jurors are not, as a rule, allowable to correct the simplest error or remedy the gravest miscarriage of justice, and the court that tries the case cannot assist by way of amendment, except in matters of mere form. The *prima facie* evidence of a man's guilt is weighed by laymen in secret conclave, the examinations are conducted no one knows how, and the finding is arrived at almost necessarily on facts which are perhaps only a small part of the truth, and all this without the assistance of the court or counsel, because the general directions given by the court, useful as they always must be, manifestly fall far short of any practical service in hearing and considering the evidence in detail. There is no public sitting in judgment on their actions. That guardian of private rights and public interests—the press—is helpless. There is no fierce "white light" to terrify and hold in check any juror concerned in wrong-doing. All the restrictions and safeguards which the law has thrown around criminal prosecutions are wanting. And worse perhaps than all, a man may be put in peril of his life upon *hearsay* testimony, the mere rumors of the neighborhood, the idle gossip of his friends, or the vindictive insinuations of his enemies, for no wise judicial hand is raised to prevent the admission of this evidence, which the law says shall not be evidence at all.

The accused is not allowed to be represented. That a person charged with an offence shall have the benefit of counsel, is one of the fundamental principles of our modern practice. A preliminary examination before a magistrate may be, it is true, a secret enquiry, and is such in theory. But what magistrate would dare to exclude prisoner's counsel? And even if he did, the accused is himself present and may ask such questions as he thinks proper, questions which often tend to throw a very different light on the evidence already given. The result is that the finding of a magistrate is really a far greater protection to the public and the accused than are the proceedings before a grand jury. The magistrate is generally a man having more or less experience in dealing with criminal cases, and in this respect he has a great advantage over the jurors. His committals often end in acquittals, but at least there is something apparent on which they are based. We have only to look at the cases which are presented to the Court at the Toronto sittings of Oyer and Terminer to see how little ground there could have been in many instances for finding a bill. Case after case has been thrown out by the trial Judge before it reached the petit jury, and men have been put upon their trial, and have undergone the humiliation of being placed in the dock as felons, without the slightest particle of legal evidence against them. In fact, we doubt if a single case can be named where a grand jury has protected either the interests of the Crown or the legal rights of a prisoner by its finding; and further, we do not believe that there is any instance where a better result has been accomplished by reason of the intervention of a grand jury than would have been gained by the magisterial enquiry alone.

Perhaps the strongest evidence that the system of grand juries has outlived its usefulness, if it ever had any, is shown by the fact that the great majority of cases are now tried before the county judges or police magistrates, and no injus-

tice has thereby been complained of. A vast amount of expense has been saved, and the delay in the trials of accused persons has been largely obviated. And another great feature is that instead of perhaps an innocent man being put in the dock and held up to the reproach of a crowded court-room, these trials have been uniformly conducted quietly, fairly, and without any injustice, and the morbid curiosity which abounds at every trial of importance before grand and petit juries has been properly held in a great measure in abeyance. We ask, then, for an example, one solitary instance, in which grand juries in the past ten or twenty years have, by reason of their intervention, protected the innocent or in any way furthered the punishment of the guilty? If no evidence of this can be given, in what does their usefulness consist?

It is urged that their visits to the gaols and other places of restraint are and must be productive of good. This contention would, under certain circumstances, have weight; but in view of the fact that responsible and trusted officers of the Government have all such places under their direct supervision, and that boards of visitors in special cases have been constituted, we do not think any one would seriously urge such an argument in favor of the grand jury system.

In these days of an irreproachable and painstaking judiciary, composed of men of the highest moral character, men who are removed from political, personal, and local feelings, and whose sense of duty outweighs any other influence—the grand jury is a useless and very often a dangerous incumbrance to our system of administering criminal justice. And in speaking as we do, we have no intention of reflecting in any way upon the individual reputation of grand jurors. We attack the system, not the men, for it would be difficult indeed to see how the system could work to any advantage to the public interests, no matter who composed the Grand Inquest.

Everything connected with a criminal trial ought to be carried out in the full light of public criticism, and no man, be he innocent or guilty, should be put upon his trial as a result of a secret and wholly irresponsible inquisition. It may be said that if the grand jury system were abolished, men might be put upon trial who would not be placed in that position if grand juries were continued. We propose to deal in a future number with the question of appointing permanent Crown Counsel, who, along with the local Crown officer, would be competent to determine in what cases the accused should go before a petit jury. We venture to say that a responsible officer, being a lawyer of good standing in his profession, and of necessity entirely removed from local influences and prejudices, would be a much safer authority to determine the only question which a grand jury has to consider than a body of local men, amongst whom, in too many instances, there are either warm friends or personal enemies of the accused.

COMMENTS ON CURRENT ENGLISH DECISIONS.

The law reports for December comprise 25 Q.B.D., pp. 521-568; 15 P.D., pp. 189-219; 45 Chy. D., pp. 285-639; 15 App. Cas., pp. 449-568.

PRACTICE—FIRM SUED—SERVICE OF WRIT ON FIRM—SUBSEQUENT SERVICE ON PARTNER—JUDGMENT AGAINST FIRM FOR DEFAULT OF APPEARANCE—SUBSEQUENT APPEARANCE BY PARTNER—ORD. IX. R. 6; ORD. XII., R. 15; ORD. XLII., R. 10 (ONT. RULES 265, 288, 876).

In *Alden* v. *Beckley*, 25 Q.B.D., 543, a partnership was sued in the firm name. The firm was first served by serving the writ on the person having the management of the business, and five days afterwards a person claimed to be one of the partners was also served. Judgment was signed against the firm for non-appearance; and subsequently and within eight days after service on him, the person served as a partner entered an appearance and then moved to set aside the judgment against the firm as having been entered prematurely; and the Divisional Court (Pollock, B., and Grantham, J.), affirming Day, J., held that the judgment must be set aside. From this case, therefore, it appears, that where a firm is sued and service is effected on the firm by serving the manager, and individuals claimed to be partners are also served, judgment cannot properly be signed against the firm until the time has expired for the individuals who have been served to appear, and that this time runs, not from the service on the firm, but from the service on themselves individually.

SUBMISSION TO ARBITRATION—REFUSAL OF PARTY TO APPOINT ARBITRATOR—COURT HAS NO POWER TO COMPEL PARTY TO APPOINT ARBITRATOR—9 & 10 W. 3, C. 15, S. 1; 3 & 4 W. 4, C. 42, S. 39 (R.S.O., C. 53, S. 16).

In re Smith & Nelson, 25 Q.B.D., 545, an attempt was made to induce the court to compel a party who had entered into an agreement to refer a dispute to arbitration, to appoint an arbitrator. The application was successful so far as the Divisional Court (Lord Coleridge, C.J., and Wills, J.) was concerned; but on appeal the order was reversed, the Court of Appeal (Lord Esher, M.R., and Lindley and Bowen, L.JJ.) being clearly of opinion that the Court had no statutory jurisdiction to make any such order, and that although where arbitrators have been appointed by the parties they can not afterwards revoke their authority (R.S.O., c. 53, s. 16), yet that there was no means of compelling a specific performance of an agreement to appoint an arbitrator either at law or in equity, and the provision of the Arbitration Act of 1889 (52 & 53 Vict., c. 49, s. 1), that a submission, unless a contrary intention is expressed therein, shall be irrevocable except by leave of the court or a judge, had not in any way enlarged the powers of the court in that direction.

DAMAGE—TUG, AND VESSEL IN TOW—COLLISION WITH THIRD VESSEL THROUGH NEGLIGENCE OF TUG—LIABILITY OF VESSEL IN TOW.

In *The Quickstep*, 15 P.D., 196, the Divisional Court of the Probate Division came to the conclusion that no general rule can be laid down as to the liability of a vessel in tow, for a collision between it and another vessel, occasioned by the

negligence of those on board the tug; but that the question turns upon whether or not the relation of master and servant exists between the owners of the vessel in tow and the crew of the tug, and this depends upon the circumstances of each case. Where the crew of the tug stand in the relation of servants to the owner of the vessel in tow, the latter are liable. When that relation does not exist, then they are not liable. In the present case, the court was of opinion that the relationship did not exist.

SHIP—CHARTER PARTY—EXCEPTION TO LIABILITY—NEGLIGENCE OF CREW—VOYAGE—GENERAL AVERAGE, CONTRIBUTION.

The Carron Park, 15 P.D., 203, was an action for damage to cargo, but by the charter party it was provided that the defendants were not to be responsible "for any neglect, or default whatsoever of their servants *during the said voyage*." The damage in question occurred during the loading of the vessel, and was occasioned by the negligence of the defendants' servants. The question was, whether the damage could be said to have occurred "during the voyage." The president, Sir J. Hannen, held that the time of loading was part of the voyage, dissenting from *Crow* v. *Falk*,, 8 Q.B., 467, and following in preference *Barker* v. *McAndrew*, 24 L.J., C.P., 191, and *Bruce* v. *Nicolopulo*, 11 Ex., 129. The defendants counter-claimed for a general average contribution. It is not clear from the report how this claim arose, but it would seem from the reasoning of the court that it must have arisen out of the negligence complained of by the plaintiff; and inasmuch as the defendants were not responsible for that negligence, the court held that they were entitled to succeed on the counter-claim.

SHIP—CHARTER PARTY—EXCEPTION OF LIABILITY FOR NEGLIGENCE OF CREW—VOYAGE.

The Accomac, 15 P.D., 208, is a somewhat similar case to the preceding one. In this case the charter party excepted the defendants (the ship-owners) from liability "for any act, negligence, or default of master or crew in the navigation of the ship in the ordinary course of the voyage." After the vessel arrived in port to discharge her cargo, it was discovered that one of the bilge pumps was out of order, and a firm of marine engineers was employed to repair it; their workmen removed it, but in order to do so they removed a cock from a water-pipe, which was not replaced. The chief engineer opened the sea-cock to admit water into the ballast tank, and went away forgetting it was open, and in consequence of the repairers of the bilge pump not having replaced the cock they had removed, the water reached and damaged the cargo. The Court of Appeal (Lord Esher, M.R., Lindley and Bowen, L.JJ.) affirmed Butt, J., holding that the damage was occasioned by two combined acts of negligence of the chief engineer, and of the workmen from the store; that the negligence had not taken place "in the navigation of the ship in the ordinary course of the voyage," and the workmen from the shore could not in any case come under the category of "master or crew," and therefore the negligence did not come within the exception, and the defendants were liable.

TESTAMENTARY SUIT—APPLICATION OF CREDITOR TO APPOINT ADMINISTRATOR PENDENTE LITE.

In the Goods of Evans, 15 P.D., 215, a will was disputed and a suit was pending to determine its validity, which the parties had neglected to bring to trial; a creditor, who was no party to that suit, now applied for the appointment of an administrator *pendente lite*, and the application was granted.

PROBATE—WILL AND CODICIL—INTERLINEATIONS AND ALTERATIONS IN WILL BEFORE CODICIL.

In *Tyler* v. *Merchant Taylors' Co.*, 15 P.D., 216, it being proved that interlineations and alterations, including a pencil-writing across the foot of the will, had been made in a will before the execution of a codicil to the will, they were admitted to probate.

WILL—TRUST FOR INVESTMENT—CONSTRUCTION—EJUSDEM GENERIS.

In re Sharp, Rickett v. *Sharp*, 45 Chy. D., 286, a testator had by his will directed his trustees to invest the residue of his estate (*inter alia*) "upon the debentures or securities of any railway or other public company carrying on business in any part of the United Kingdom." The question for the Court was, whether under this power the trustees could invest in the shares of companies incorporated under the Companies' Act, or whether the reference to railway companies restricted the power of investment to companies *ejusdem generis* as railway companies. The Court of Appeal (Cotton, Bowen, and Fry, L.JJ.), affirming the opinion of Stirling, J., decided that a company incorporated under the Companies' Act was a public company within the meaning of the power, and that the power was not restricted by reason of the specific reference to railway companies. The Court, however, was careful to say that though other companies came within the power, an investment in them would not be warranted without due inquiry into their prospects and all other things which trustees ought to consider as prudent men.

WILL—CONSTRUCTION—GIFT FOR LIFE, COUPLED WITH GIFT OVER, ON DONEE FOR LIFE DYING WITHOUT HAVING CHILDREN—IMPLIED GIFT TO CHILDREN.

In re Rawlins, 45 Chy.D., 299, shews the danger of a judge deciding a case on a view of the law not advanced by any of the litigants. Kay, J., adopted that course in the present case, but the Court of Appeal (Cotton, Bowen, and Fry, L.JJ.) were agreed that he was wrong. The point was a somewhat curious one, arising on the construction of a will, whereby the testator made a gift of certain property to his niece, Harriet Rawlins, for life, with a gift over "on the death of Harriet without leaving children." There was also a gift of the residue. Harriet left two children, and she also made a will whereby she bequeathed all her property to one of them; there was a contest between the two children on the one hand, who claimed that Harriet was entitled for life only, and that on her death leaving children the latter became entitled by virtue of an implied gift; and those claiming under the residuary devise, on the other hand, who contended that there was no implied gift. On the hearing, Kay, J., introduced a third element of

discord, for he decided contrary to the contention of any of the parties, that the effect of the will was to vest an absolute estate in Harriet, and, therefore, he held her devisee took the whole estate. On the appeal, however, the court disagreed with his view, and held that Harriet only took a life estate, and that on her death the residuary devise took effect. In arriving at this conclusion, the court approved of, and adopted, the rule laid down by the Irish Master of the Rolls in *Kinsella* v. *Caffrey*, 11 Ir. Ch. 154. It may also be useful to notice that although only one of the residuary devisees appealed, yet the court nevertheless made a declaration generally, that in the events which had happened the property in question had fallen into the residue.

VENDOR AND PURCHASER—SUBSTITUTION BY VENDORS OF NEW TITLE—RESCISSION BY PURCHASER.

In re Head & Macdonald, 45 Chy.D., 310, may be read in conjunction with the recent case in our own court of *Paisley* v. *Wills*, 19 Ont., 303. The case was an application under the Vendor and Purchaser Act, 1874. The vendors were trustees under a will which contained a power to sell after the death of the testator's widow, and they entered into a contract for the sale of the trust property on 17th December, 1889; 24th January, 1890, being fixed for the completion of the contract. On the 22nd December, 1889, the abstract was delivered. The purchaser then inquired if the testator's widow was living, and was informed that she was and would join in the conveyance; to which the purchaser's solicitor rejoined that as she was living the power to sell had not arisen. On the 6th January, 1890, the vendor's solicitor wrote, contending that the power could be accelerated by the widow surrendering her life estate. On the 7th January the purchaser's solicitor repudiated the contract and claimed a return of the deposit. This the Court of Appeal (Cotton, Fry, and Lopes, L.JJ.), affirming the opinion of Chitty, J., decided the purchaser was entitled to, and in doing so they determined that a mere authority to trustees to pay debts did not create an implied power to sell the trust property in order to pay them, and in this respect a mere authority to pay differs from a positive direction. In *Paisley* v. *Wills* the title was in the vendor's wife, and not in the vendor himself, but she offered to convey to the purchaser; the latter resisted the performance on the ground of fraud, and it was not until the trial that by amendment then made he claimed rescission on account of the infirmity of the title, although he knew of the defect sometime previously; and the court was of opinion that the neglect promptly to repudiate the contract on that ground deprived him of the right to insist on the objection. It may be noted that *Re Bryant & Birmingham*, 44 Chy.D., 218, does not appear to have been before the court in that case.

COSTS—SET OFF—ORD. LXV., R. 27 (21) (ONT. RULE 1204).

In re Crawshay, Dennis v. *Crawshay*, 45 Chy.D., 318, on the dismissal of an appeal, the respondent asked that the costs might be directed to be set off against costs which had been previously ordered to be paid to the appellants out of the estate. But the court declined to make any order, but stayed the payment out

of the costs to the appellants for two weeks, to enable the respondents to carry in their bill before the taxing-officer, who, under the Ord. lxv., r. 27 (21) (Ont. Rule 1204), had power to make the set-off.

EXECUTOR—PAYMENT TO LEGATEE WITH NOTICE OF LIABILITY—LEGATEE, WHEN LIABLE TO REFUND—MARRIED WOMAN, LIABILITY OF, TO BE SUED—MARRIED WOMAN'S PROPERTY ACT, 1882 (45 & 46 VICT., C. 75), S. 1, S-S. 2—R.S.O., C. 132, S. 3 (2).

Whittaker v. *Kershaw*, 45 Chy.D., 320, deals with two interesting points. First, the liability of a legatee to refund to the personal representative; and second, the liability of a married woman to be sued in respect of claims not strictly arising out of contract. The facts of the case were as follows: The defendant, a married woman, was a residuary legatee. The executors handed over to her, as the residuary estate, the certificates of some shares not fully paid up, and also a sum in cash. No transfer of the shares was made. Subsequently a call was made on the shares, the defendant refused to pay; an action was then brought against the executors in whose name the shares stood, and they were compelled to pay the call, with costs of the action. They then applied to the defendant to recoup them and she refused, and they thereupon applied to the court and obtained an order directing the sale of the shares, which failed to realise sufficient to pay the calls, and left a balance due the executors, to recover which the present action was brought. It was contended by the defendant that she was not liable to refund, because the executors had paid over the residue with notice of the debt; and, also, because the action would lie against a married woman, because it was not founded on any contract made by her. As to the first point, the Court of Appeal (Cotton, Fry, and Bowen, L.JJ.) determined that, though where an executor makes a payment to a legatee with notice of a debt due by his testator he cannot call upon the legatee to refund on being subsequently compelled to pay the debt; the same rule does not apply where the executor has merely notice of a liability; and that notice of a liability for calls is not notice of a debt, because no debt arises in respect of calls until the call has been duly made; and, therefore, in the present case the executors having notice of the liability was no bar to their right to recover. As to the other point, the court determine that the liability of a married woman to be sued is not restricted to cases founded on contract or tort, but that the words "a married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, *or otherwise*, in all respects as if she were a *feme sole*," 45 & 46 Vict., c. 75, s. 1, s.s. 2 (R.S.O., c. 132, s. 3 (2)), render a married woman liable to be sued for any cause of action for which a man could be sued under similar circumstances; and, furthermore, that her liability to suit is not barred because her separate property is subject to a restraint against anticipation, although that fact may be an obstacle in the way of the plaintiff recovering on a judgment, should he obtain one. The Court of Appeal, though expressing some doubt on the point, held that the right to indemnity extended to the costs of the action against

the executors to recover the calls; at the same time they intimated that as that point was not discussed before them, they might not see fit to consider themselves bound by their present decision on that particular point. It may be well to note that the words of R.S.O., c. 132, s. 3 (2), are not identical with the English Act, but probably bear the same construction.

COMPANY—GENERAL MEETING—CHAIRMAN REFUSING TO PUT AMENDMENT—WAIVER.

Henderson v. *Bank of Australasia*, 45 Chy.D., 330, was an action brought to test the validity of a certain resolution passed at a general meeting of the shareholders of a company. The ground of objection was that the chairman had improperly refused to put an amendment, proposed by the plaintiff, to the meeting. The proposed amendment was not written out nor expressed very explicitly, but the Court of Appeal found as a fact that the chairman understood what was intended, and inquired if any one seconded it, and upon it being seconded stated that he was advised by the solicitor of the company that no amendment could be put, and accordingly refused to put it to the meeting. The original resolution was passed, the plaintiff moving its rejection and voting against it. The resolution was confirmed at a subsequent meeting, at which the plaintiff attended and protested on the ground that the resolution was not within the notice calling the meeting, and that the chairman had refused to put his amendment. The Court of Appeal (Cotton, Fry, and Lopes, L.JJ.) (overruling Chitty, J., who thought the plaintiff had waived his right to object by acquiescing in the chairman's ruling) held that the resolution must be set aside, and that there had been no waiver by the plaintiff of his right to object.

ILLEGAL CONTRACT—STIFLING PROSECUTION—INDICTMENT FOR OBSTRUCTING—SPECIFIC PERFORMANCE.

Windhill Local Board v. *Vint*, 45 Chy.D., 351, was an action for specific performance of a covenant to restore a highway, in which the doctrine of the illegality of stifling a prosecution appears to be carried to the verge of absurdity. The defendants were stone merchants and were indicted by the plaintiffs (a municipal body) for nuisance for interfering with a highway by excavating a stone quarry and for obstructing a footpath. The indictment came on for trial and the defendants pleaded "not guilty." On the same day an agreement was drawn up by the counsel and solicitors of the parties, whereby the defendants agreed within a limited time to abate the alleged nuisance, to the satisfaction of the defendants' surveyor; and that the indictment should lie in the office as security for the performance of the agreement; and that when the terms were fulfilled a verdict of "not guilty" should be entered. The judge approved of the terms of this agreement and ordered the indictment to lie in the office. A deed was subsequently executed by the parties embodying the terms agreed to. The defendants having failed to carry out the agreement, this action was brought to compel them to specifically perform it, and was dismissed by Stirling, J., on the ground that the agreement was founded on an illegal consideration; because, as the indictment was for a public injury, the agreement to consent to a verdict of "not guilty" was

against public policy and illegal, which decision was affirmed by the Court of Appeal (Cotton, Fry, and Lopes, L.JJ.). We may observe that precisely the same conclusion was arrived at by our own Court of Appeal, upon an almost identical state of facts: *Hungerford* v. *Latimer*, 13 Ont. App. 315. At the same time, although there can be little room to doubt that the courts have correctly expounded the law as it is, we think it open to question whether the law might not properly be amended in this particular. Rules of this kind rest on considerations of public policy, and on a supposed regard for what is in the best interests of the public, and we cannot help thinking that in cases of this nature it would better conserve public interests if, under such circumstances, there were power, with the sanction of the judge at the trial, legally to make and enforce such an agreement as that in question.

Notes on Exchanges and Legal Scrap Book.

AN EXPENSIVE PLEADING.—Perhaps the most expensive pleading that was ever framed in any suit was the answer in the celebrated case of *Small* v. *Atwood*, a copy of which it was sworn would cost £19,000 sterling: *Bennett's Biographical Sketches from the Note-Book of a Reporter*, p. 114.

LIBELLING A MUNICIPAL CORPORATION.—A municipal corporation cannot sue for libel. So it was held by Mr. Justice Day and Mr. Justice Lawrance in *Mayor, etc., of Manchester* v. *Williams*, in which case the defendant charged that "bribery and corruption had existed and done their nefarious work in the case of two, if not three, departments of the Manchester city council, and that the plaintiffs were either parties thereto, or culpably ignorant thereof," etc. It is of importance to inquire how far this decision is reconcilable with that in *Metropolitan Saloon Omnibus Company* v. *Hawkins*, 4 H. L. 87, the only modern authority on the subject. In that case the defendant imputed to the company insolvency, mismanagement, and an improper and dishonest carrying on of its affairs. It was expressly held that the company could maintain an action, but the court no doubt put its judgment on the ground that the natural result of the defendant's imputation was that the plaintiff's business might be damaged, and Chief Baron Pollock went so far as to say that a corporation could not sue in respect of a charge of corruption, "for a corporation cannot be guilty of corruption, though the individuals composing it may." There is therefore a great distinction between that case and the recent Manchester case, but the dictum of Chief Baron Pollock is a strong authority in favor of the Manchester case. We are not so sure, however, that the decision in the Manchester case is correct. Supposing, for instance, that a municipal corporation were issuing a loan, would not an imputation of general corruption existing in the town council discourage the public from coming forward as subscribers? We should be glad to see the question argued before a court of appeal.—*The Law Times.*

INSURANCE POLICY AND PREMIUM NOTES.—An insurance policy provided that a note taken for the premium should be accepted as payment only until maturity, that if not paid at maturity the policy should be void while it remained unpaid, and that, on payment of the note after maturity, the policy should be in force from such payment. The property was burned after maturity of the note, and while it remained unpaid. *Held*, that a tender of payment after the fire would not revive the company's liability. The time of credit was so short that it can scarcely be contended that the date of payment had escaped the memory of the appellee. The appellee was required to know the time the note matured, and the duty rested upon him to pay his note without notice or demand from the appellant. In the case of *Insurance Co.* v. *Leonard*, 80 Ind. 273, it is held that a policy of insurance is governed by the same principles applicable to other agreements involving pecuniary obligations. It is also held in the same case that where a policy provides that if premium notes are given and are not paid the policy shall become void. It is a good defence to an action on the policy that the premium notes were unpaid at the time of the loss, and this is in accordance with the holdings of this and other courts. *Insurance Co.* v. *Henley*, 60 Ind. 515; *Willcuts* v. *Insurance Co.*, 81 id. 300. The case of *Thompson* v. *Insurance Co.*, 104 U.S. 252, is directly in point in this case. In that case the court says that "it appears from the special pleas that the policy contained the usual condition that it should become void if the annual premiums should not be paid on the day when they severally became due, or if any notes given in payment of premiums should not be paid at maturity." And distinguishing between that case, and the case of *Insurance Co.* v. *French*, 30 Ohio St. 240, the court further says: "But in this case the policy does contain an express condition to be void, if any note given in payment of premium should not be paid at maturity. We are of the opinion therefore that while the primary condition of forfeiture for non-payment of the annual premium was waived by the acceptance of the notes, yet, that the secondary condition thereupon came into operation, by which the policy was void if the notes were not paid at maturity." It is further said by the court in that case: "The third replication sets up a usage on the part of the insurance company of giving notice of the day of payment, and the reliance of the assured upon having such notice. This is no excuse for non-payment. The assured knew, or was bound to know, when his premiums became due." Further on the court says: "The reason why the insurance company gives notice to its members of the time of payment of its premiums is to aid their memory, and to stimulate them to prompt payment. The company is under no obligation to give such notice, and assumes no responsibilities by giving it. The duty of the assured to pay at the day is the same whether notice be given or not. Banks often give notice to their customers of the approaching maturity of their promissory notes or bills of exchange, but they are not obliged to give such notice, and their neglect to do it would furnish no excuse for non-payment at the day." What we have quoted applies with full force in this case. Ind. Sup. Ct., Sept. 24, 1890. *Continental Ins. Co.* v. *Dorman.* Opinion by Olds, J.—*Albany Law Journal.*

"MEMORANDUM" UNDER STATUTE OF FRAUDS.—In *Mentz* v. *Newwitter*, New York Court of Appeals, Second Division, December, 1890 (reversing 14 Daly, 524), it was held that an auctioneer's memorandum, made and signed by him at the time of the sale of real estate, which gives the name of the vendee, but fails to state the name of the vendor, or to give any description by which he or she may be identified, is void under the statute of frauds. The court, Brown, J., said: "Many English cases in regard to sales of goods and chattels are collected in Benjamin on Sales (Bennett's edition), sections 234 to 238, and that learned author states the general rule deduced from them to be as follows: 'It is indispensable that the written memorandum should show not only who is the person to be charged, but also who is the party in whose favor he is charged. The name of the party to be charged is required by the statute to be signed, so that there can be no question of the necessity of his name in the writing. But the authorities have equally established that the name or a sufficient description of the other party is indispensable, because without it no contract is shown, inasmuch as a stipulation or promise by A. does not bind him save to the person to whom the promise is made, and until that person's name is shown, it is impossible to say the writing contains a memorandum of the bargain.' The leading English case on the subject is *Champion* v. *Plummer*, 1 Bos. & P. 252, where Champion, by his agent, wrote down in a memorandum book the terms of a verbal sale to him by the defendant, and the defendant signed the writing. The words were 'Bought of Plummer,' etc., etc., with no name of the person who bought. Sir James Mansfield, C. J., said: 'How can that be said to be a contract or memorandum of a contract which does not state who are the contracting parties? By the note it does not appear to whom the goods were sold. It would prove a sale to any other person as well as to the plaintiff.' Among other cases may be cited *Williams* v. *Lake*, 2 E. & E. 349; *Williams* v. *Byrnes*, 9 Jun. (N. S.) 363; *Potter* v. *Duffield*, 9 Eng. 664. *Potter* v. *Duffield* was a case of a sale of real estate at auction. The name of the vendor was not disclosed. The plaintiff's agent signed a memorandum of the contract, and the auctioneer signed for the vendor as follows: 'Confirmed on behalf of the vendor, Beadles, per N. J., Aug. 20, 1869.' This was held by the master of the rolls, Sir George Jessel, not a sufficient memorandum under the statute, for the reason that the vendor was neither named nor described. The question was fully examined by the Supreme Court of the United States in *Grafton* v. *Cummings*, 99 U.S. 100. That case arose in the State of New Hampshire, where the statute provides that no action can be maintained on a contract for the sale of land unless the agreement is signed by the party to be charged, or by some person by him authorized. The contract was signed by Grafton, the purchaser, and it was assumed by the court that it was also signed by the auctioneer, and the precise question presented was stated to be whether the contract was void because the vendor was not named in it. It was held that it was void. The same doctrine is stated in Brown Stat. Fr., §§ 371-375; Smith Cont., pp. 134, 135; 3 Pars. Cont. 13 note v. In this State Chancellor Kent, in *Bailey* v. *Ogden*, 3 Johns. 399, stated the general rule to be that 'the form of the memo-

randum cannot be material, but it must state the contract with reasonable certainty, so that the substance of it can be made to appear, and be understood from the writing itself, without having recourse to parol proof.' Again the same learned judge, in *Classon* v. *Bailey*, 14 Johns. 484, said: 'Forms are not regarded, and the statute is satisfied if the terms of the contract are in writing and the names of the contracting parties appear.' *First Baptist Church* v. *Bigelow*, 16 Wend. 28, was a case of a sale of a church pew. The same rule was again stated, and the memorandum was held insufficient because it stated no parties or terms of payment. *Calkins* v. *Falk*, 39 Barb. 620, was a case of a sale of hops. The written memorandum was held defective, and the rule stated that the terms of the contract and the names of the contracting parties must appear in the instrument. This case was affirmed in this court. 41 N. Y. 619; 1 Abb. Dec. 291. The opinion of the court appears in the latter volume, where it is held that the names of the contracting parties must appear in the memorandum required by the statute. In nearly all the cases in this State *Champion* v. *Plummer, supra*, was cited with approval, and the whole current of authority in this State is that the memorandum must contain substantially the whole agreement and all its material terms and conditions, so that one reading it can understand from it what the agreement is. *Wright* v. *Weeks*, 25 N. Y. 159; *Drake* v. *Seaman*, 97 id. 230. No case holding a different rule is cited by the General Term and none by the counsel for the respondent, except *Salmon Falls Manf'g Co.* v. *Goddard*, 14 How. (U. S.) 276. There was a strong dissent in that case, and it was said in *Grafton* v. *Cummings* that it was to be doubted whether the opinion of the majority was sound law. It is clearly in conflict with the general current of authority, and may well be disregarded in view of the later decision of the same court. Tested by the rule established by the adjudged cases, the memorandum in this case was insufficient to answer the requirements of the statute."—*Albany Law Journal.*

Reviews and Notices of Books

The History of Canada. By William Kingsford, LL.D.,F.R.S. (Canada), Vol IV. (1756—1763). Toronto: Rowsell & Hutchison. London: Trübner & Co., Ludgate Hill, 1890.

We have been favored with a copy of the fourth and last volume of this valuable work, and feel bound, for the reasons we assigned for noticing the three former volumes, to call the attention of our readers to that now before us. The close of Vol. III. left the aspect of affairs favorable to French ascendency, after the destruction of Oswego, the extension of French power on Lakes Champlain and Ontario, and down the Ohio and Mississippi to New Orleans. The present volume records the principal events which, commencing with the advent of Pitt to power, and his energetic policy and action, ended in the conquest and cession of Canada to England; and relates the expedition under

Forbes against Fort Duquesne, his defeat and heroic perseverance until, on the repetition of his advance, he found the Fort abandoned; the siege and taking of Fort Niagara; the abandonment of Fort Rouillé; the operations on Lakes George and Champlain; the siege and capture of Quebec, the military and naval manœuvres connected therewith, and the persistent and gallant efforts made by the French after its fall, in divers places and with alternating success and defeat, until the final siege, capitulation, and surrender of Montreal—in short, the battles, sieges, and fortunes on either side, the tragic close of the ancient feud between two of the foremost nations of the world, and their fierce contest for the possession of North America. And in his account of the period between the conquest and the final cession of the country and the establishment of British rule, which is sometimes spoken of as *le regne militaire*, and regarded as a period of harsh dealing with the French-Canadians, Dr. Kingsford has shown that the implied reproach is unfounded and unjust.

The narrative is accompanied and illustrated by the fullest details of every circumstance connected with the events recorded, tables of the forces engaged and maps of the localities in which they occurred, and the names and characters of the personages who conducted or took leading parts in them. The book is clearly printed and well got up in every way. The table of contents gives an intelligible summary of each of the eleven chapters into which the work is divided, and the index is very full and skilfully made, so that the portion of the text relating any event, place, or person, can be readily found. The articles of capitulation at Quebec in 1759, and at Montreal in 1760, and those of the Treaty of Paris in 1763, bearing upon the cession of Canada to the Crown of Great Britain, and the rights granted as to Newfoundland, are given at length. The maps, seven in number, are well constructed and engraved, and placed near the portions of the text in which they are referred to, and the plan adopted in the preceding volumes, of placing at the head of each page the A.D. of the events referred to in it, is continued, so that every facility for the use of the work is afforded; and a succinct but intelligible account of the synchronous events in Europe which affected Canada is given, as being necessary to the clear understanding of those in Canada itself. Dr. Kingsford has again shown his power of appreciating and describing the characters of the actors in the great drama he presents to us, and among others that of Lord Bute, whom he dislikes and holds up to scorn and contempt as both knave and fool, and of whom he says that "If there was no word but Newfoundland in the Treaty of Paris, it would be enough to establish the blight which Bute's presence cast upon the Empire; there is a charge brought against Bute which it is impossible to pass over unnoticed, that he was the recipient of money from France to influence him in the settlement of the peace." His tribute to the memory of another Scotchman, Brigadier-General Forbes, who took Fort Duquesne, and whom he calls "one of the forgotten heroes who died for us," is written in the same whole-hearted affectionate strain in which he writes of Champlain in his first volume, and he closes, as he did in the case of his favorite hero, with the expression of his deep regret that "no monument is erected to Forbes, either in his native place or in

Pennsylvania or Virginia, where he had lived, or Pittsburg, which he founded, though notwithstanding this neglect his name will be emblazoned in its own nobility in the page of history as that of one whose genius and patriotism secured for the British race the Valley of the Ohio, the southern shore of Lake Erie, and the territory extending to the Mississippi." This is wrong, no doubt; but how much greater is the wrong done by Canada to the memory of the man to whom she owes her existence, for there is still no monument to the memory of Champlain, though a county, a lovely lake, "once ours, now lost," and a not very lovely street in Quebec, bear his name. This should not be; and although we understand that a patriot member of our profession, Mr. Lighthall, of Montreal, and some others zealous for Canada's honor, propose to put up tablets with suitable inscriptions at places in that city where events of an historical character have occurred, and one of which will record Champlain's selection and approval of the site on which Montreal was subsequently founded by M. de Maisonneuve, this will discharge a very small portion of Canada's debt of gratitude. Wolfe and Montcalm share one monument at Quebec, with a brief but admirable inscription recording their equal valor and fame and the gratitude of posterity. Why should not Montreal have a like memorial of Champlain, which might be read and understood by our own citizens and by strangers of every nation? It is some time since we left school, and law Latin is not generally of the purely classical type, yet in moving the resolution we must suggest a form suitable for adoption or for amendment by our younger and more scholarly brethren, fresher from the teachings of our excellent universities:

SAMUEL CHAMPLAIN
VIR BONUS FORTIS CHRISTIANUS
GENTIS CANADENSIS CONDITOR VERUS
GENERISQUE HUMANI
DECUS INSIGNE.

We have, in our former notices, stated our appreciation of Dr. Kingsford's qualifications for the great work he has performed so well; his extensive knowledge, indefatigable industry, and deep patriotic interest in his subject; and his honorable impartiality and fairness in the statement of facts, and in the inferences he draws from them; and we hold the same opinion still, and believe that he has faithfully performed his duty as an historian, without fear, favor, or affection, so far as human frailty permits. He is English, and takes an English view on points which admit of honest difference of opinion; but we again repeat the conviction expressed in our notice of his first volume, that "No French-Canadian can be dissatisfied with the account the book gives of his ancestors, that no English Canadian can refuse to acknowledge the merits of his French precursors, and that no student of Canadian history can afford to be without it."

Before we received our copy of the fourth volume, we saw with great pleasure that Dr. G. M. Grant, Principal of Queen's University, Kingston, had written for *The Week* of the 28th November last an elaborate and excellent critique on the work now before us, in which he fully confirms the opinions we have expressed respecting it, and from which we quote the following passage: "It is satisfac-

tory that we have in Dr. Kingsford a historian who has, at the cost of enormous labor, sought and consulted original authorities, and who, after sifting evidence and coming to his conclusions, does not allow himself to be biased, on one side or the other, by any considerations of so-called courtesy or self-interest. No volumes in English known to me are a nobler tribute to the French-Canadians than those now completed. Whether describing Champlain, the hero 'with no moral leaven to weaken the regard or esteem with which his character may be considered,' or more complex and very different personalities like La Salle or Frontenac, or that Jesuit of the Jesuits—Rasle—whom he forces us to respect and almost to love; or in detailing the sacrifices that the *habitant* was always ready to endure for his country and his faith, and the piety and unity of feeling that made a handful of people able to hold their own against the greatest odds, he is always fair, and therefore, without intending it, building up the noblest monument to our French-Canadian ancestors." He then cites a passage from pages 217-18, and says, "It is impossible to read this volume without being convinced that, had it not been for the generous and abundant aid of the Mother Country, French domination would have been established over the greater part of North America," and adds, "Dr. Kingsford also speaks some pregnant words in the last pages of his work, and with them I shall bring this notice to a close. May I also be permitted to thank him for the great work he has given us, and to express the hope that, if no official recognition is given him, the public will do so in the best way by ordering his history to be placed in every Mechanics' Institute, school, and city library, and by purchasing it freely and giving it to their sons and daughters to read." He then cites verbatim, and with unqualified approval, the last four paragraphs of pages 503 and 504, in which the the author claims that he has fully performed the promise he made to be impartial, and to spare no pains to ascertain and state the truth. He states forcibly and clearly the benefits which all Canadians, and French-Canadians especially, have derived from representative and responsible government, and the necessity of that harmony and unity without which all hope of becoming a nation is baseless and futile.

In all this, and in all that Dr. Grant says about our author and his work, we most cordially agree, as we do also in his wish for its public recognition in the manner he suggests, and that our public schools may become such that even a minority of one in any parish may send his children to be educated with the assurance that their faith will be respected by their teacher. We rejoice to have so high an anthority for believing that this wish can be realized; and though we are not quite without fears, arising from the great and peculiar difficulties of our case, we say heartily—Amen; so may it be. W.

The Elements of Jurisprudence. By Thomas Erskine Holland, D.C.L., etc. Fifth edition. Oxford, 1890.

Mr. Holland's book is too well known to require any further review at our hands; we can add nothing to what has already been said about it. This edition has been carefully revised throughout.

Introduction to the Study of Federal Government. By Albert Bushnell Hart, Ph.D. Boston: Ginn & Co., 1891.

This second of the series of Harvard Historical Monographs outlines the development of federal government, and compares the constitutions of the United States, Switzerland, Germany, and Canada.

The Blackstone Text-Book Series—Index. The Blackstone Publishing Co., Philadelphia, Penn.

The promised consolidated index of all the subjects treated upon in this useful series has been issued. Such an index cannot fail to be of the greatest use to those possessing the series, since all the subjects therein contained can be immediately found by referring to this volume alone, without having recourse to the thirty-six different indices. It is greatly to be hoped that the publishers will re-consider their decision not to republish any more English-text books in this series, which has been so useful to the profession of Canada.

Proceedings of Law Societies.

HAMILTON LAW ASSOCIATION.

The annual meeting of the Hamilton Law Association was held there on the 6th inst., at the library in the Court House, and was very fairly attended by the members of the legal profession of the city and county. Mr. Edward Martin, Q.C., the president of the association, was in the chair, and after the usual routine business, presented the annual report of the association, which exhibited a very satisfactory state of the library, there being upwards of 2,000 volumes upon the shelves. Mr. W. F. Burton, the treasurer of the association, presented the annual statement of receipts and expenditures. The receipts for the past year amounted to $1,038.38, which revenue is derived from annual subscriptions from the members of the profession in the city and county, from an annual grant from Osgoode Hall based upon the number of members of the association, a small grant from the County Council, and a grant from the Government of Ontario. A vote of thanks was passed to Miss Counsell for the efficient and faithful manner in which she had discharged her duties as librarian. The election of officers for the ensuing year was next proceeded with, and Mr. E. Martin, Q.C., was unanimously elected president; Mr. Mackelcan, Q.C., vice-president; Mr. W. F. Burton, treasurer; Mr. E. Kittson, secretary; and the following gentlemen trustees: Messrs. Bruce, Q.C., Lazier, Q.C., Staunton, Teetzel, Q.C., and Nesbitt, Q.C., in addition to the officers of the association. Below will be found the reports of the president and treasurer of the most influential society outside of Toronto. Mr. Martin, in moving the adoption of the report, referred to the

great interest taken by members of the profession in the work, and drew attention to the working of the Devolution of Estates Act, urging action being taken to prevent abuse of the same. He also mentioned the satisfactory condition of the finances, and that, owing to the suggestion of the treasurer (Mr. Burton), a successful application for a yearly grant had been made to the Ontario Government.

TRUSTEES' REPORT, 1890.

The trustees beg to present their eleventh annual report, being for the year 1890.

The number of members at the date of the last report was seventy. One new member has been added, namely, Mr. Burkholder, and the present membership is seventy-one.

The annual fees to the amount of $312.50 have been paid.

The number of volumes in the library is 2227. The increase for the year would have been greater, but the trustees being of opinion that the American series of Reports, to which the association subscribed, was apparently but little referred to though very prolific in numbers, exchanged the volumes for a United States Digest and some other books, which, it is hoped, will be found more useful.

The following periodicals are received, namely:—

The Law Times (English), *The Times Law Reports*, *The Solicitors Journal*, *The Albany Law Journal*, THE CANADA LAW JOURNAL, *The Canadian Law Times*, *The Western Law Times*.

The treasurer's report is submitted herewith giving a detailed statement of the receipts and expenditure and of the assets and liabilities of the association, and the same is in the form required by the Law Society.

The indebtedness to the Law Society is being paid, as agreed, in yearly payments, but $800 still remain unpaid, and these payments are a serious drain on the funds of the association.

The association is to be congratulated on having increased its revenue by the grant made by the Ontario Government to this and other law associations in aid of the purchase of books, and specially designed to be of assistance to the Judges at Assizes, Chancery Sittings, Election Trials, and for the County Stittings; the amount received was $58.83, but a much larger grant is expected this year, and is urgently needed.

The trustees for the ensuing year hope to be in a position to make some very valuable additions to the library.

The trustees would repeat the remarks made in their last annual report regarding the Devolution of Estates Act.

Steps should be taken to devise machinery for the proper working of this Act, having in view the transaction of the business where it arises.

(Sgd.) EDWARD MARTIN, Pres.

Hamilton, January 5th, 1891.

Treasurer's Report, 1890.

Receipts.

1890.					
March	5	By Balance brought forward from last year, including students' deposits.	$90		$101 78
	"	Annual Grant from the Law Society, arrived at as follows :			
		Grant, 67 members	$325 00		
		Librarian	$200 00		
		Telephone	37 72		
			237 72		
		Less ⅓	79 24		
				158 48	
				483 48	
		Less instalment of advance payable 31st Dec., 1889		100 00	
					383 48
March	14	By Amount of loan raised on joint note of Messrs. Martin and Burton			100 00
July	2	" Grant from County Council			40 00
"	30	" Grant from the Ontario Government under the head of Judges' libraries			58 83
Oct.		" Subscriptions of 61 members at $5.00			305 00
		" " " 3 " " 2.50			7 50
		" Students' deposits during year			30 00
		" One entrance subscription			10 00
		" Interest on deposits			1 79
					$1 038 38

Expenditure

1890.				
March	6	To Paid for Sterling draft to B. F. Stevens	$219 28	
	"	" " " " " Clowes & Sons (2)	146 73	
	"	" " " " " T C. Watkins, duty on books	53 05	
	"	Bell Telephone Co.'s accounts	50 74	
	"	Carswell & Co. for books	27 00	
	"	Weed & Co., *Albany Law Journal*	5 00	
	"	Plastow (Caretaker)	5 00	
	"	Expenses deputation to Toronto	5 00	
	"	Rowsell & Co.'s accounts	7 44	
	"	Stamps	3 67	
	"	Royal Insurance Co	22 00	
	"	Stephens, for frame	2 25	
	"	West Publishing Co	6 45	
	"	Powis Sinking Fund Tables	4 00	
	"	Eastwood & Co. Binding etc.	46 26	
	"	Printing	1 75	
	"	Paid Mr. Papps in full of account for books	34 00	
	"	" Mr. O'Reilly in full of account for books	22 00	
	"	Miss Counsell, salary for the year	260 00	
	"	Petty cash	55 00	966 62
		By Balance on hand		$ 71 76

Audited and found correct.

(Sgd.) W. A. H. Duff,
" Chas. Lemon, } Auditors.

(Sgd.) W. F. Burton,
Treas. Law Association.

Hamilton, Ont., Dec. 31st, 1890.

DIARY FOR JANUARY.

1. Thur.....New Year's Day.
4. Sun.....*2nd Sunday after Christmas.* Chief Justice Moss died, 1861.
6. Tues.....Epiphany. Civil Assizes at Toronto, Hamilton, London, and Ottawa. Christmas vacation ends.
11. Sun.....*1st Sunday after Epiphany.*
12. Mon.....County Court Sittings for motions in York. Surrogate Court Sittings. Sir Chas. Bagot Gov.-Gen., 1842.
13. Tues.....Court of Appeal sits.
15. Thur.....Lord Stanley of Preston born, 1841.
18. Sun.....*2nd Sunday after Epiphany.*
21. Wed.....Lord Bacon born, 1561.
25. Sun.....*3rd Sunday after Epiphany.*
26. Mon.....Sir W. B. Richards died, aged 75.
31. Sat.....Earl of Elgin. Gov.-Gen., 1847. Last day for paying fees for Annual Certificates.

Reports.

ONTARIO.

COUNTY COURT, COUNTY OF SIMCOE.

IN RE PLAXTON, A SOLICITOR, ETC., AND

IN RE ELLIOTT *v.* MCCUAIG.

Settlement of action—Lien of solicitor.

The defendant having been arrested on a capias order on appeal to the High Court, obtained his discharge from custody, with costs in the cause against the plaintiffs in any event.

Subsequently, and while the cause was pending trial, the plaintiffs effected a settlement of the action with the defendant, without the knowledge or concurrence of his solicitors.

The latter thereupon claimed a lien as solicitor upon the said judgment, or order for costs; but the plaintiffs contended that the settlement relieved them from payment of the same.

***Held*, that the defendant had not released the plaintiffs from the payment of such costs; and whether or not the settlement purported to do so, the solicitor's right of lien was not extinguished.**

[Barrie, Nov. 25th, 1890.

This was an appeal by the defendant from an order made in Chambers staying proceedings, and a petition by his solicitor to have a lien declared in his favor, both made to a County Court *in banc.*

The facts sufficiently appear in the judgment.

Pepler, Q.C., for plaintiffs.

C. W. Plaxton in person, and for defendant.

ARDAGH, CO. J.:—The defendant, McCuaig, having been arrested upon an order made in this court, was thereafter (on the 8th March last) on an application to a Divisional court of the High Court of Justice discharged from custody, and the order of arrest set aside, with costs against the plaintiffs. On the 9th April last the parties appear to have come together in the office of a third solicitor, and entered into a settlement of all matters in dispute.

This settlement is in the words and figures following :—

"Orillia, 9th April, 1890.

"Elliott *v.* McCuaig.

"This case is this day settled and determined by and between the parties thereto, Findlay McCuaig and Jno. Elliott & Sons—on the understanding and agreement that Elliott & Sons, the plaintiffs, deliver up to the defendant the notes sued on herein, and the plaintiffs also allow the defendant to retain as his property, free and clear of all claims, the binder sold to the defendant by the plaintiffs, and the defendant hereby releases and discharges the plaintiffs from all claims, suits, actions, and demands of every nature and kind whatsoever, for and on account of this action, and the order of arrest and other proceedings taken therein by the plaintiffs; it being the understanding that the defendant releases all actions and claims of every kind against the plaintiffs, and this being a final settlement of all differences, disputes, and actions between plaintiffs and defendant. The plaintiffs and defendant also agree that no further proceedings be taken in the action.

his

Witness, (Sgd) Finlay × McCuaig.

(Sgd) R. D. Gunn. mark.

After being fully explained and read over."

Subsequently, and notwithstanding this settlement, the defendant's solicitor, Mr. Plaxton, entered the action for trial at the last June sittings of the county court, and gave notice of trial to the plaintiffs' solicitors. This notice was, before said sittings, set aside on the application of the plaintiffs, after hearing all parties, and further proceedings were stayed.

The defendant's solicitor, at the last sittings of this court in July for the hearing of motions, filed his petition setting out that the settlement between the parties was not a *bona fide* one, and that the effect of it was to prevent his recovering the costs to be paid by the plaintiffs under the order of the Division Court of 8th March last, that defendant had no means of paying petitioners' costs against him, and he prayed to have it declared that he was entitled for a lien as a solicitor upon the said judgment

and the costs awarded thereunder, and that the said settlement might be set aside. Defendant's solicitor also, at the same sittings, moved to have the order setting aside the notice of trial for the June sittings and staying proceedings, and asking leave to issue execution upon the judgment of the Divisional Court for costs.

These motions were argued together, and now may fitly be considered together. I do not see my way clear to setting aside the settlement between the parties, so far as to allow the defendant to set the case down for trial. By the settlement the case is settled, and the plaintiffs state they have no further cause of action against the defendant, and under this settlement the defendant seems to have secured very liberal terms. It appears that Mr. Plaxton's object in having the stay of proceedings set aside is that he thinks this stay is in the way of his proceeding to recover the costs ordered to be paid by plaintiffs, by the Divisional Court in Toronto, when the defendant succeeded in having the order for arrest set aside.

Now, when the application was made to set aside the notice of trial given for last county court sittings in June and stay proceedings, my intention was simply to stay further proceedings in the way of a trial about a matter which the parties had settled between them, and where the defendant had obtained the same benefit as if he should succeed at the trial.

I certainly did not consider that I was adjudicating in any way on the defendant's claim to proceed for the costs on the motion before the court above, nor was it necessary for me to do so. So far, then, as the order of June last, staying proceedings, affects either directly or indirectly the right of defendant to proceed for those costs, it must be varied so as to permit the defendant to proceed, if he be so advised, to recover those costs in the usual way. The settlement may, perhaps, then be set up as a defence to defendant's right to recover them. This settlement, which is silent as to any costs, releases the plaintiffs from all "claims, suits, actions, and demands of every nature and kind whatsoever, for and on account of this action, and the order of arrest and other proceedings taken by the plaintiffs."

Does not this appear as if it was intended to relieve the plaintiffs from any liability for what they had done in arresting the defendant? Does it relieve the plaintiffs from liability for costs incurred on proceedings taken by the defendant?

But the settlement goes on to say: "It being the understanding that the defendant releases all actions and claims of every kind against the plaintiffs, and this being a final settlement of all differences, disputes, and actions between plaintiffs and defendant." The question now would be: Has this the effect of preventing defendant's solicitor from recovering the large amount of costs incurred in setting aside the arrest of the defendant and ordered to be paid by the plaintiffs, which Mr. Plaxton says the defendant is unable to pay, and which he must lose if he cannot get them from the plaintiffs? But apart from this, Mr. Plaxton files affidavits to show that the question of costs was expressly excepted when the settlement was made—that the plaintiffs' agent, who made the settlement on their behalf, said that they would pay the costs in question, and that the reason that this agreement to pay these costs was not included in the settlement was, that plaintiffs' agent said that he was not sure what the judgment (meaning, I presume, the order setting aside the arrest) said about the costs. The affidavit of the defendant is contradicted by that of the plaintiffs' agent (one Eggleston), who swears that "each party was to pay his own costs of the action"; and, further, that he agreed to allow the defendant to keep the binder (for which the notes sued on were given) to enable him to pay his solicitor's fees. It might be contended that the "costs of the action" meant only such costs as were yet *in medio*, and respecting which the liability of each party was as yet undecided. The defendant's statement is corroborated by the affidavit of one Thompson, who was present. The solicitor who drew up the settlement was examined before the Master at some length as to what took place at the settlement, but on reading his examination, I cannot come to any conclusion as to which version he supports.

If the agreement was, as Eggleston says, that each party should pay his own costs, he appears notwithstanding to have made the plaintiffs pay them, or a part of them at least, by handing over the binder in question to the defendant towards the payment of the costs for which he was liable—though the agreement itself does not appear to favor Eggleston's story on this point.

Defendant's story is in a manner corroborated, as to *his* understanding of what took place, at least, by the fact that the day after the settlement he wrote to his solicitor, Mr. Plaxton, saying that he had settled, "they pay all costs and give me the binder, but could not get no money from them." On receiving this letter, Mr. Plaxton swears that he wrote at once to defendant, saying that he would not recognize any settlement that would deprive him of his right to look to the plaintiffs personally for his costs, which, as his bill shews, amounted to the sum of $226 at that time, after giving credit for all moneys received from defendant; and that the day following he wrote to the plaintiffs and to Messrs. McCarthy & Pepler, their solicitors, to the same effect. On the 19th of April the defendant himself sent a telegram to the plaintiffs (residing at London), in these words, "I wont abide by the settlement unless you decide to pay my solicitors the costs under the judgment herein."

All this would show that if it had been necessary, the defendant's solicitor had in good time repudiated the settlement, provided that the effect of it was to deprive him of his costs. This was not a case, however, in which it was necessary to give notice to prevent the money being paid over. There is, as Mr. Pepler contended, no fund upon which defendant's solicitor could claim a lien, unless indeed it may be the judgment or order of the Divisional Court obtained against the plaintiffs for the defendant's costs through the exertions and by means of his solicitors. Assuming this to be a "fund" or whatever we may call it (and practically it was one in favor of defendant's solicitors, and not himself), two questions may be asked: 1. Was this judgment order or "fund" such as the defendant could release and surrender to the plaintiffs without his solicitor's consent or concurrence; and (2) did he actually effect this release by the terms of the settlement entered into. If it were necessary to consider whether the liability for those costs was under a "judgment" or an "order," the case of *Onslow* v. *Commissioners I. R.*, L. R. 25 Q.B.D., 465, would seem to show that it was an "order."

Mr. Plaxton claimed a lien upon this "fund" (to call it so for the present), and the answer was that a defendant's solicitor could not claim a lien in the same way as a plaintiff's solicitor. The case of *Wardell* v. *Trenouth*, 8 P.R. 142, shows that a *defendant's* solicitor has a lien on a fund as well as a *plaintiff's* solicitor. Be the order or judgment against the plaintiffs what it may, it was something that was obtained by the industry and partly at the expense of the defendant's solicitor, and the proceeds of which he would have a right to retain whenever received.

Had he not succeeded in the application, to set aside the arrest, the defendant would have been liable to his solicitor for the costs of the proceedings—his success relieved defendant from such liability so long as the plaintiffs were able to pay them. Now, the defendant is worthless, and if the plaintiffs are relieved from payment, the solicitor must go without. The second question, "Are the plaintiffs relieved from the payment of the costs ordered, by reason of this settlement?" I think that where the liability of the plaintiffs for those costs, is upon an order made against them, and upon which execution might issue, there must be something very clear indicating that such liability has been released. This is not clear from the terms of the settlement, and the evidence *dehors* tends, in my opinion, to shew the contrary.

I have examined some of the cases referred to: *Ross* v. *Buxton*. L.R. 42 Chy. D., 190, *Morgan* v. *Holland*, 7 P.R. 74, and *Friedrich* v. *Friedrich*, 10 P.R. 308, and from the principles laid down there, I do not think I would be wrong in holding, if it were necessary to do so, that whatever the costs in question may be called, the right of the defendant's solicitor to them should not be ousted by this settlement.

Looking at the circumstances attending the settlement, while, perhaps, it might be going too far to say that collusion was proved, still I must say a strong suspicion is raised that plaintiffs' agent knew he was doing something that the defendant's solicitor, and indeed I might say, plaintiffs' solicitor also, would not approve of or consent to. Defendant swears, and is not contradicted, that he wished to see his solicitor before he made any settlement, but that the plaintiffs' agent dissuaded him from it, saying his (defendant's) lawyer would advise him to keep the case going, and that he had no money to do it; and he finally persuaded him to go to a third solicitor to have a settlement carried out.

Whether then this settlement purports to release the costs in question or not, I think it should be declared that the right of defendant's solicitor to enforce the payment of such is not extinguished; that it should be referred to the Master of this court, to ascertain the amount of those costs, and that the plaintiffs should be ordered to pay the same, together with the costs of these applications.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE OF ONTARIO.

COURT OF APPEAL.

7th D.C., Stormont, etc.] [Dec. 12.

SULLIVAN *v.* FRANCIS.

Execution—Fraud — Collusive purchase—Division Courts—Practice—Appeal—Notes of evidence—Security.

The goods of a tenant were seized for rent and offered for sale by a bailiff. The tenant bid them in and they were immediately seized under an execution against him on behalf of an execution creditor of the tenant. They were then claimed by a third person who alleged that the tenant was in reality bidding for him, and this claimant paid the purchase money:

Held, that if the goods were sold at an undervalue owing to the bids being made by the tenant ostensibly for himself as part of a scheme between the tenant and claimant to (effect that end) defeat creditors by keeping down the price, the sale would be fraudulent and void as against the creditors of the tenant, though it would be good as far as the purchase money was concerned, which could not in any event be recovered back by the claimant.

Appeal allowed and new trial ordered.

The right of appeal from the Division Court is not lost because the judge omits in an appealable case to take down the evidence at the trial in writing.

The security to be given on a Division Court appeal is now regulated by 53 Vict., c. 19 (O.), and is to be either by a bond in the sum of $100 or a cash deposit of $50.

H. H. Dewart for the appellant.

A. H. Marsh, Q.C., for the respondent.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

STREET, J.] [Dec. 6.

IN RE SIMS v. KELLY.

Prohibition– Division Court—Erroneous interpretation of statute—Husband and wife—Magistrate's order for payment of maintenance money under 51 Vict., c. 23, s. 2—Action to recover arrears.

Where new rights are given by a statute with specific remedies for their enforcement, the remedy is confined to those specifically given. And where a wife obtained a magistrate's order under 51 Vict., c. 23, s. 2, for payment by her husband of a weekly sum for her support;

Held, that her rights were subject to the provisions of the statute, one of which was that payment could be enforced only in the manner pointed out by the statute, and that if the husband succeeded in shewing the magistrate that he was unable to pay, payment would not be enforced; and therefore an action in the Division Court for arrears of payments, under the order, could not be maintained against her husband.

The facts not being in dispute, prohibition to the Division Court was granted on the ground that the judge in that court had given an erroneous interpretation to the Act referred to in holding that the magistrate's order was equivalent to the final judgment of a court, and that an action upon it would lie.

Wilkes, Q.C., for the defendant.

W. D. Jones for the plaintiffs.

Chancery Division.

FERGUSON, J.] [Nov. 28.

BUNNELL *v.* GORDON.

Declaration judgment—Inchoate right to dower—Purely contingent possibility—R.S.O., 1887, c. 44, s. 52, s.s. 5.

Action for a declaration that the plaintiff was entitled to an inchoate right of dower in certain lands.

Held, that though an inchoate right of dower might be considered as a present right to a contingent future interest in the land in question, yet it was not a case where a declaratory decree such as was asked should be made, though

R.S.O., 1887, c. 44, s. 52, s.s. 5, no doubt enabled the court to make such a decree even in a case like this, where no consequential relief was or could be claimed.

What was asked was a declaration as to a claim which might be made by another or others under circumstances which might or might not happen, and to grant such a declaration would be making a radical change in the rules and practice of the court, which R.S.O., 1887, c. 44, s. 52, s.s. 5, was not intended to do.

O'Gara, Q.C., for the plaintiff.

Snow for the defendant Gordon.

Henderson for the other defendants.

BOYD, C.] [Dec. 5.

MCCORMICK *v.* TOWNSHIP OF PELEE.

Municipal corporation—Reparation of highway —Highway washed away by lake.

Where a highway running along the side of a lake had been eaten away by the action of the water so as no longer to be traversable,

Held, that the municipality were not called upon by law to restore it. The municipality were not bound to erect a sea-wall to keep off the action of the water, and without one any ordinary reparation would be ineffectual.

T. M. Morton and *J. L. Murphy* for the plaintiffs.

M. A. McHugh for the defendant.

BOYD, C.] [Dec. 6.

BANKS ET AL *v.* THE CORPORATION OF THE TOWNSHIP OF ANDERDON ET AL.

Municipal corporation — By-law — Separate School.

A municipal corporation cannot by by-law extend the boundary of a Protestant separate school section into or over an adjoining public school section when the teacher in the latter is not a Roman Catholic.

Armour, Q.C., and *Kirkland*, for plaintiff.

McHugh and *Murphy* for defendants.

ROBERTSON, J.] [Jan. 2.

GOULD *v.* ERSKINE.

Action for seduction—Action brought by mother in life-time of father—Demurrer—Common law right of action.

Demurrer to statement of claim in action of seduction brought by the mother of the girl seduced, it being alleged therein that the father was not resident in Ontario either at the time of the birth of the child, or at the commencement of the action; the said demurrer being on the ground that the plaintiff had no right of action, which, if any, was in the father.

Held, that in the absence of the father from the Province, the mother, with whom the girl had been living and doing service, had a common law right to bring the action, and this was all that was necessary. The statute R.S.O., 1887, c. 58, is an enabling Act, and does not interfere with the common law right of action.

Johnston, Q.C., for the demurrer.

Hilton and *McCulloch*, contra.

BOYD, C.] [Jan. 8.

RE ABBOTT *v.* MEDCALF.

Mortgage—Power of sale—Notice of sale— Execution creditor.

In taking proceedings under a power of sale in a mortgage drawn under the Short Forms Act in these words, "Provided that the said mortgagee, on default of payment for one month, may, on giving one month's notice, enter on, and lease or sell the said land,"

Held, that execution creditors of the mortgagor come within the scope of the word "assigns," and as such are entitled to notice under power of sale; but only those entitled at the time notice is given need be served. Execution creditors coming in subsequently to the notice given, but before the sale is carried out, are not entitled to be served.

Worrel, Q.C., for the vendor.

Coatsworth for the purchaser.

Practice.

C.P. Div'l Ct.] [Dec. 1.

GRÆME *v.* GLOBE PRINTING CO.

Security for costs—Libel—R.S.O., c. 57, s. 9— Action frivolous.

Where an action of libel was brought by one Græme, complaining of statements published in a newspaper, imputing a crime to one Graham, and it appeared that it was stated in the article complained of that no one would believe the charge against Graham, and that in an article published in the same newspaper after the commencement of the action, it was stated that the

person referred to in the former article was not the plaintiff,

Held, that the action was frivolous, and the defendants were entitled to security for costs under R.S.O., c. 57, s. 9.

Hilton for the plaintiff.

Langton, Q.C., for defendants.

ROSE, J.] [Nov. 29.

TORONTO DENTAL MANUFACTURING CO. *v.* MCLAREN.

Judgment—Application by plaintiffs to vacate their own judgment — Fraud — Mistake—Merger.

Judgment was recovered by the plaintiffs against the defendant upon a promissory note given for part of the purchase money of goods sold by the plaintiffs to the defendant.

Under the execution issued upon the judgment the goods sold were seized, and were claimed by the defendant's wife under a bill of sale from her husband, which recited that in purchasing the goods he acted as her agent.

Held, upon the evidence that fraudulent collusion between the husband and wife to defeat the plaintiffs' claim, was not established; and in the absence of fraud or mistake the court would not grant the plaintiffs the extraordinary relief of vacating the judgment against the defendant in order to allow them to proceed against the wife.

Held, also, that so long as the judgment stood, no action could be brought upon the original cause of action, which had become merged.

G. G. Mills for the plaintiffs.

J. M. Clark for the defendant.

C. J. Holman for Janet McLaren.

BOYD, C.] [Dec. 3.

KELLY *v.* WADE.

Order of court—Delay in issuing—Abandonment—Effect of pronouncing judgment on merits.

The plaintiff in an action of tort recovered a verdict which was set aside and a new trial granted by the order of a Divisional Court in June, 1889. The plaintiff died in the spring of 1890, and at the time of her death the order had not been issued.

Held, upon an application in December, 1890, that the defendants were entitled to issue the order; the delay affording no evidence of an intention to abandon it.

A judgment pronounced by the Court, affecting the merits, is an effective judgment from the day it is pronounced; the formal signature of the judgment is merely the record that it has been pronounced.

MacKelcan, Q.C., for the plaintiffs, by revivor.

Aylesworth, Q.C., for the defendants.

OSLER, J.A.] [Dec. 6.

DAVIDSON *v.* TAYLOR.

Attachment of debts—Judgment for damages—Non-entry of — Solicitor's lien for costs—Amount of—Powers of Division Court Judge —R.S.O., c. 51, s. 197.

The judgment of the judge who tries the cause, with a jury or without one, is now an effective judgment from the day on which it is pronounced; and where damages are awarded thereby, they are attachable as a debt without the formal entry of judgment.

Holtby v. *Hodgson*, 24 Q.B.D., 103, followed.

Where solicitors claimed a lien for costs upon a judgment recovered, the amount of which was the subject of a garnishee suit in a Division Court,

Held, that the judge in the Division Court had power under s. 197 of the Division Courts Act, R.S.O., c. 51, to decide upon the proper sum to be allowed in respect of such lien, and was not bound to refer it elsewhere.

W. M. Douglas for the appellant.

W. H. Blake for the respondent.

STREET, J.] [Dec. 18.

MCLEAN *v.* ALLEN.

Receiver—Equitable execution—Share under will—Construction of will—Security—Creditors' Relief Act—Appointment of receiver in action in which judgment recovered.

Motion by the plaintiff to continue an order for the appointment of a receiver by way of equitable execution, and motion by the defendant to discharge the order.

The interest of the defendant in the property sought to be realized was acquired by him under a will devising an interest to the defendant during his life for the support and maintenance of himself and his children, with remainder to the heirs of his body or to such of his children as he

might devise the same to. The property in question consisted of real as well as personal property.

Held, that the defendant was entitled under the will to a beneficial interest which should be applied in payment of his debts; but it could not be decided upon this motion whether his creditors were entitled to the whole or only to a portion.

2. That as the rights of the receiver were limited to receiving those moneys which were the absolute property of the debtor, free from any trust, it was not improper to make the appointment without security.

3. That the provisions of the Creditors' Relief Act form an exception to the general rule, and are not to be extended to cases not actually provided for by that Act; and therefore the appointment of the receiver was properly made for the benefit of the plaintiff alone.

4. That costs should not have been awarded against the defendant upon an *ex parte* motion.

5. That it is proper to appoint the receiver in the action in which judgment has been recovered.

A. H. Marsh, Q.C., for the plaintiff.

D. W. Saunders for the defendant.

ROSE, J.] [Dec. 29.

WATSON *v.* ONTARIO SUPPLY CO.

Married woman—Judgment debtor—Commitment.

An order may be made for the commitment of a married woman to gaol, for refusal to attend for examination as a judgment debtor. Rules 926 and 932 and R.S.O., c. 67, s. 7, considered. *Metropolitan L. & S. Co.* v. *Mara*, 8 P.R. 355, followed.

Aylesworth, Q.C., for the plaintiff.

C. Millar for the defendant Capewell.

DIVISION COURTS.

The Junior Judge of the County of Ontario has sent to the clerks in his county the following memorandum for their guidance, which will be found useful by others of their brethren :—"In consequence of the interpretation put upon the 'Married Woman's Property Act' by the courts, it would appear that the ordinary forms of judgment and executions are not applicable as against a defendant who is a married woman; and, further, that no judgment by default, such as is permitted in cases of 'Special Summons' is valid as against a married woman.

"Clerks will, therefore, in cases in which claims are put in against persons who they know, or have reason to believe, are married women, not to issue, as against such, the 'Special Summons,' but the 'Ordinary Summons' only; and to add to the 'Particulars of Claim' the following statement: 'The defendant (A.B.) is a married woman, and has separate estate, and contracted the liability in question in respect of such separate estate.' The clerk will not enter judgment in such cases, but will put them on the list for hearing at the ensuing sittings. The form of entry of judgment will be as follows: 'It is adjudged that the plaintiff do recover $— and costs; such sum and costs to be payable out of the separate property hereinafter mentioned, and not otherwise. And it is ordered that execution herein be limited to the separate property of the said defendant, not subject to any restraint against anticipation, unless by reason of Section 20 of the 'Married Woman's Property Act' such property shall be liable to execution notwithstanding such restriction.' The warrant of execution thereon will be varied so as to read: 'You are required to levy of the separate property of the said defendant, in said county not exempt from execution and not subject to any restraint against anticipation, unless by reason of Section 20 of 'The Married Woman's Property Act' such property shall be liable to execution notwithstanding such restriction, the said moneys and your lawful fees, etc.'"

Flotsam and Jetsam.

PROLONGED SITTINGS.—Some extraordinary judicial doings are reported from Queensland, Australia. The presiding judge was in a hurry to get away, and tried cases continuously for thirty-six hours. At one stage all the available jurors were occupied in considering verdicts, and, not to lose time, the judge ordered the doors of the court room to be locked, and then impounded every person in the audience qualified to serve. Many of the jurors were so exhausted by continuous service that they fell asleep in their seats, but the trials went on.—*Ex.*

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IT has been rumored that it is proposed to appoint some member of the Canadian Bench or Bar to the Judicial Committee of the Privy Council. We much question there being any foundation for this rumor. We also question the desirability of such a step. The very essence of the excellence of this tribunal consists in its supreme indifference and consequent undisputed impartiality in all cases coming before it; and if any such appointment were made, it would necessarily be of our best man, whom we could least spare. In every case that comes before it, the Court is assisted by counsel from the colony from which it comes, and with all the knowledge they possess of the law on which the decision may depend; and there does not appear to have been any complaint of want of ability or of willingness to use that ability, in the Court as now constituted, or any reason for adding a judge whose appointment might be supposed to imply such want in its present members.

The Behring Sea controversy has assumed a new phase by the application made by Mr. Choate, under instructions from Sir John Thompson, at the instance of the Imperial Government, to the Supreme Court of the United States for a writ of prohibition to the District Court, forbidding its execution of the judgment condemning the sealer, *W. P. Sayward*. A correspondent of *The Mail* has shewn by citation from the United States laws that the Supreme Court has the power to issue such writ, "where a state or an ambassador or other public minister, or a consul is a party," the word "state" clearly indicating a foreign state, and not a state of the Union—and Great Britain is such a state and Her Majesty's Attorney-General for Canada a proper authority to convey Her Majesty's instructions to Mr. Choate in this case, the *Sayward* being a British ship owned in Canada. Some doubts have been expressed in the newspapers as to the form of the application or the action of the court, but Mr. Choate is not likely to be wrong on those points. It seems to us that the supposition that the American Government or people can be annoyed at what Sir John Thompson has done is ridiculous, and that no greater compliment could have been paid the Supreme Court or the Government which appointed it than the application in question. Both Americans and Canadians are deeply indebted to Sir John for his suggestion. To suppose that the American Government could, or would if it could, control the action of the court, would be an insult to both and to the law.

THE English Law Reports are not the place one usually resorts to for occasions of amusement, and yet one sometimes comes upon some bright jewel in their dull and decorous pages suitable for the mirth of grave and sober men, such as, we all know, the legal profession is composed of. One of these solemn jokes is the case of *Haslewood* v. *Consolidated Credit Co.*, 25 Q.B.D., 555. The action was one of trespass, instituted in the Lord Mayor's Court. The defendants justified their acts under a chattel mortgage for £30 made by the plaintiffs. The plaintiffs claimed the mortgage was void under the Bills of Sale Act, and its validity turned upon the question whether the variations it contained from the form prescribed by the Act were of such a character as to be readily understood without legal assistance. The plaintiffs claimed that they were not, and that the stipulations for repayment of the loan were obscure and difficult to understand. The plaintiff was non-suited in the Mayor's Court, and then appealed to the Queen's Bench Division, and it so happened that the Divisional Court on this occasion was composed of no less exalted personages than the Lord Chief Justice and the Master of the Rolls who, after a solemn, critical, grammatical consideration of the terms of repayment, were agreed that they were obscure and difficult to understand, and that the chattel mortgage was therefore void. With a persistence paralleled only by the insignificant amount at stake, the defendants appealed to the Court of Appeal, where Lindley and Bowen, L.JJ., presided. After hearing argument, they evidently felt a little delicacy in overruling the two chiefs, so they ordered the case to be re-argued before the full court (Cotton, Lindley, and Bowen, L.JJ.), and upon its coming up before them, the counsel for the appellants were not even called on. After hearing what the respondents' counsel had to say, they unanimously reversed the decision of the Lord Chief Justice and the Master of the Rolls, and not only dissented from their law, but politely ridiculed their grammar, and held the clause perfectly plain and unambiguous. One would have thought that the very fact that two eminent judges should differ from three others on its construction was *prima facie* evidence that it could not be very clear; but it so happened that in *Goldstrum* v. *Tallerman*, 18 Q.B.D., to which Lord Esher, M.R., himself had been a party, the Court of Appeal had decided that such a difference of opinion among judges had no such result. Bowen, L.J., tried to soften the blow by ascribing the difference of opinion between the Court of Appeal and the Divisional Court to the fact that the Court of Appeal had the case of *Goldstrum* v. *Tallerman* in their minds, which the Court below had not, yet the reporter with a brutal regard for accuracy is careful to state in a foot-note that that case was cited to the Divisional Court: perhaps the true explanation of the decision of the Divisional Court is to be found in the fact that the mortgage bore interest at the modest rate of sixty per cent. per annum; and it was as Carlyle would say a case of "approximate justice striving to accomplish itself in one way or another." As an instance of the marvellous persistency of litigants, and the occasional apparent obtuseness of the ablest judges, and the indiscretion of law reporters, the case in question is a striking instance.

LEGAL ANTIQUES.

While sauntering along the streets of an old but flourishing city one day, when the Dog-star was ruling all nature with its fiery sway, I chanced upon an imposing building; something within my breast caused me to pause and gaze upon the structure with an unusual amount of interest. Over the chief entrance was the statue of a lady evidently belonging to a bye-gone day; her dress, although appropriate to the season (if comfort only was to be considered), was yet rather scant, and such as would have incurred the severe condemnation of the Lord Chamberlain, had he sat in judgment upon it. Methought that perhaps at some time during the ages past her soul abode in the breast of an ostrich—for as a bandage was across her eyes she could not see, and judging from the coolness and calmness with which she stood, she thought that she herself could not be seen; she was like naked truth. In one hand was a sword of such mighty proportions that it would have taxed all her strength to wield it; and I afterwards found that in consequence she ofttimes neglected to strike when she should have smitten, and sometimes she smote when from knowledge obtained after she had lifted it on high she would have had mercy. In her other hand she held a pair of balances; from the accumulation of dust and cobwebs on these, I fear she could not always weigh with scientific accuracy—they would not always be "equal scales, whose beam stands firm, whose rightful cause prevails." The sculptor had so placed the bandage above her slender nose, tip-tilted, that when she chose she could see on one side.

But I am like many another, slandering her whose name was Justice, called in her early days by those world civilizers, the Greeks, Themis, the daughter of Heaven and Earth. The building was a temple erected for her honor, and containing the work-rooms of her ministers and servants, but which, alas! were often turned into dens of thieves.

I entered the building and found therein divers spacious apartments, each one of them a veritable old curiosity shop, filled with relics of the past, memorials of the day and objects affecting the future. I quickly found that of the numbers trooping into the building many hurried through unmindful of their surroundings, and as if everything was naught, while others who had brains behind their eyes saw many a wonder, many a thing of beauty, many a thing *monstrum, horrendum, informe.*

In some of the rooms I found

> The old laws of England; they
> Whose reverend heads with age are grey,
> Children of a wiser day;

in others, creatures green, untried, but powerful to hurt, armed cap-a-pie, as was Minerva when she sprang from Jove's almighty head; but if they had issued from the head of any Jove, it was but from the head of a nodding Jove. There was stowed away an immense amount of rubbish, as the Rev. Mr. Gascoigne would say; but then "I don't see that law rubbish is worse than any other kind of rubbish. It is not so bad as the rubbishy literature that people choke their minds with. It doesn't make one so dull," as Mr. Rex would respond.

One chamber contained a wonderful collection of old actions—real ones, we were told by the guide, philosopher, and friend, who joined us and escorted us over the building—a well-read cicerone was he, one eloquent as the original founder of that family, an old Roman family, as compared with which those who came over with the Conqueror are but as yesterday. In this room three ancient servitors John Doe, Richard Roe and the Casual Ejector clad in the composite suits of bye-gone days acted as janitors or caretakers; these servants, hard-worked for generations, were begrimed with dust and dirt: they were of the earth, earthy; for although neither farmers nor real estate agents, they had, until appointed to their present position, always worked in land. Arranged in cases round the rooms were numerous actions, long since disposed of, settled and embalmed in the books like flies in amber.

"What be these?" I asked, pointing to a trio, evidently triplets, save in so far as the adjectives old, older, oldest, might distinguish them. "These are writs of aiel, besaiel, and tresaiel," was the answer, given with an air of surprise at the archæological ignorance of the last decade of the nineteenth century.

"And what were they when they lived and moved and had their being?" I queried, for I knew that writs used to run in days when all the rest of the world only crept.

The answer given was, "When a man's grandfather died seized of land (and in those old days when a man had a grandfather the grandsire always had land), and a stranger entered and kept out the heir, then a writ of aiel issued forth to put things to rights: when a great-grandfather died and a stranger intermeddled, then besaiel was invoked; and when his great-great-grandfather, then tresaiel came to the rescue."

I felt inclined to ask what writ would have issued if a stranger had interfered on Adam's death, but the gravity of my guide made me repress all my feelings of levity. Impressed with the keenness of discrimination possessed by our ancestors, I passed on to another set of three, and was told that they were Formedon in descender, Formedon in remainder, and Formedon in reverter. Formidable affairs, by the Olympians!

"Are these antiques?" I questioned.

"They go back to the time of Westminster the Second, in the days of Edward the First."

"Were they of value?"

"They were the highest writs that any tenant in tail could have to recover land."

"Have you a tenant in tail here?"

"Yes, many of them of former generations; but the family still survives and is vigorous, especially among the aristocracy."

"Are all other tenants descended from these entailed ones, as the Darwinians say, that the man of to-day is from the tail-adorned ape?" I enquired, anxiously.

"No, my friend. It is not a case of evolution, but retrogression. Tenants in tail are younger than tenants in fee; they are the offspring of the venerable statute, De Donis Conditionalibus. Tail is akin to tailor; yet though it requires

only nine tailors to make a man (a statement which, according to Jekyll, is as old as Magna Charta), still any number of tenancies in tail will not make a tenancy in fee."

My friend then pointed out some strange-looking things, which he seemed to consider worthy of minute attention; they were writs, and labelled, "entry sur desseisin in the quibus," "entry sur desseisin in the pur," another "in the per and cui," and yet a fourth "in the post." But I hurried on to where I saw a man, lugubriously sitting, surrounded by a host of shadowy forms; so alike, these shades, that no one who was a stranger could tell them apart; so unlike that it would at all times have been unsafe to summon one to your aid when another should have been employed. The man was clad in a black gown, and bemoaned and wept—like Rachael weeping for her children—because these sham, yet real things, were no more. They lie buried in the dust of ages past. The tombstone on which their names were engraven, though visible to the men of the Ontario statutes of 1877, is not to be seen by those of 1887 (*Vide* R.S.O., 1877, c. 51, s. 75).

Next we entered a room in which were only women, dressed in widows' weeds. "Who be these relicts of matrimonial bliss?" I asked.

"These are doweresses," was the reply, "they have placed their husbands in the ground, and on that ground they claim part of their husbands' grounds."

"They seem to differ considerably in appearance?"

"Yes, and with reason. That one was the last to obtain dower ad ostium ecclesiae; there is one who in her day had dower ex assensu patris; those whose weeds are fading and who sing the doleful refrain of the Laureate, "Too late, too late," have been longer widowed than those others whose mourning is still fresh and new, who look so gladsome and are weaving chaplets."

"How is that? Is it not contrary to the usual way of widows? Do they wreathe the crowns for the graves of the dear departed ones?"

"The chaplets are to adorn the massive brows of Ontario's Attorney-General The mourners are those childless ones whose good men died without wills—before the Dog-days of the year of grace, 1886; and they receive from the hands of the Law but one-third of the husbands' lands and tenements, and that only for their lives; while the happy ones having managed to persuade their husbands to postpone their submundane journeyings until after Dominion Day, 1886, now (thanks to the Government of Ontario) get one-half of all their late partners' property."

I passed on, meditating on the power for weal or woe of politicians.

In another room were preserved various old suits in equity and suits in chancery—far more costly were these than the suits of armor preserved in the ordinary museums. Some of them were hoary with age; others were anything but sweetly savored; some had been dragged on for years and years; others were so foul that no one could get into them with clean hands. Here we saw some visionary and imaginary ones, like Jarndyce and Jarndyce and Peebles and Plainstanes, "et per contra," and Hutchinson against Mackitchinson. "Oh, it is a beautiful thing to see how long and how carefully justice is considered in this country," as the man in the Mackitchinson suit anent the backyard said to the

Antiquary when speaking about Scotland. Peter Peebles thought "it grandeur upon earth to hear one's name thundered out along the long arched roof of the court-house, and see 'a' the best lawyers in the house fleeing like eagles to their prey.'"

On one side of the room were relics from Scotland collected by a Mr. Burton, "interlocutors, suspensions, tacks, wadsets, multiple poindings, adjudication in implement, assignations, infeftments homologations, charges of horning, quadrennium utiles, vicious intromissions, decrees of putting to silence, compact actions of declarator and reduction improbation," while across the room were English specimens gathered by the same collector, and which he himself much preferred, such as, "common recoveries, demurrers, quare impedits, tails-male, tails-female, docked tails, latitats, avowries, nihil dicits, darrien presentments, emparlances, mandamuses, qui tams, capias ad fraciendum and ad witherman." There were a number of old Scotch suits in which the Lord Ordinary had "refused interim interdict, but passed the bill to try the question, reserving expenses; or had repelled the dilatory defences, and ordered the case to the roll on the peremptory defences; some that he had taken to avizandum, or had ordered re-revised condescendence and answers on the conjoint probation; and some he had sisted diligence till caution be found, judicio sisti."

In the same apartment were a lot of French "bills of complaint, accusations, impeachments, indictments, warnings, citations, summonings, compositions, appearances, mandates, commissions, delegations, instructions, informations, inquests, preparatories, productions, evidences, proofs, allegations, depositions, cross-speeches, contradictions, supplications, requests, petitions, inquiries, instruments of the deposition of witnesses, rejoinders, replies, confirmations of former assertions, duplies, triples, answers to rejoinders, writings, deeds, reproaches, disabling of exceptions taken, grievances, salvation bills, re-examination of witnesses, confronting of them together, declarations, denunciations, libels, certificates, royal missives, letters of appeal, letters of attorney, instruments of compulsion, delineatories, anticipatories, evocations, messages, dismissions, issues, exceptions, dilatory pleas, demurs, compositions, injunctions, reliefs, reports, returns, confessions, acknowledgments, exploits and executions" which Justice Bridlegoose, so much spoken of by Rabelais, had well and exactly seen, surveyed, overlooked, reviewed, read and read over again, turned and tossed over, seriously perused and examined, both at the one and the other side, as a good judge ought to do, conformed to what had been noted thereupon.

Our guide told us that this eminent judge was, like Lord Eldon, never hasty or rash in dealing with the cases before him, but had been known to say, "I defer, protract, delay, prolong, intermit, surcease, pause, linger, suspend, prorogate, drive out, wire-draw, and shift off the time of giving a definitive sentence, to the end that the suit or process, being well fanned and winnowed, tossed and canvassed to and fro, narrowly and precisely, and neatly garbled, sifted, searched and examined, and on all hands exactly argued, disputed and debated, may by succession of time come at last to its full ripeness and maturity." He thought that by this means, "when the fatal hazard of the dice ensueth thereupon, the parties

cast or condemned by the said aleatory chance will, with much greater patience and more mildly and gently, endure and bear up the disastrous load of their misfortune than if they had been sentenced at their first arrival in the court."

I moved on, as poor Jo was told to do, and entered another chamber. "Here we have a collection of documents of priceless value;" remarked an expert in handwriting, "records and writings that have figured in legal history, and autographs of the great, the wise and the good, that have come within the eye of the law."

This attendant pointed towards two old scraps of paper. "Those," said he, "speak not only volumes, but the character of the writer as well; they are not open, fervent, eloquent epistles, breathing nothing but the language of affectionate attachment" (we saw that plainly enough at a glance); "but covert, sly, underhand communications."

With interest we read as follows, "Garraway's, twelve o'clock. Dear Mrs. B., Chops and Tomato Sauce. Yours, Pickwick." "Dear Mrs. B., I shall not be at home until to-morrow. Slow Coach." Charmed was I to see the signature and caligraphy of the immortal Pickwick—the tell-tale letters in Bardell versus Pickwick—the letters with which Sergeant Buzfuz convinced the enlightened, high-minded, right feeling, conscientious, dispassionate, sympathizing, contemplative jury to give the poor widow seven hundred and fifty pounds damages. In the same case we saw the warrants issued by George Nupkings, Esquire, Justice of the Peace, and under which Gummer, the bailiff, arrested Blank Pickwick and Blank Tupman, for intending to fight a duel "against the peace of our suffering Lord, the King, statit in that case made and purwided." Here they had Antonio's bond, once held by Shylock; and the deed of gift whereby that unfortunate son of Abraham had to give all that he was possessed of at his death unto his son Lorenzo and his daughter. By itself stood the will of Adam—a monstrously long affair, and no wonder, for, as the Arabs say, when that grand old gardener was about to prepare the document, Gabriel descended from heaven with sixty-two millions of angels, each provided with a clean white sheet of parchment and a new quill pen, the archangel sealed the will as a witness. We looked in vain for the clause in Adam's testament which the first Francis of France was so anxious to see—the one whereby the vast inheritance of the Americas was given to the Spaniards, as the Pope said. Near by was another parchment, with the seal of Caesar, found by Antony in his closet, his will; giving to every Roman citizen, to every several man, seventy-five drachmas. Beside this, inscribed on a brick-bat, was the will of Sennacherib, "the Assyrian who came down like a wolf on the fold;" he gave a lot of precious things to his son Esarhaddon, a youth who, to please his father, had changed his name to Assursar-illik-pal.

The only other document that we examined in that room was an ancient Egyptian deed, on parchment, of a piece of land in hundred-gated Thebes, written one hundred years before our era, and with a certificate of registration attached. The descriptions of the parties were more minute than those now given; this is how they were mentioned, "Pamonthes, one of the male grantors

aged about forty-five, of middle stature, dark complexion, handsome person, bald, round faced, and straight nosed; Snachomneus, aged about twenty, of middle size, sallow complexion, round faced, and straight nosed; Semmuthis Persinei, aged about twenty-two, middle size, sallow complexion, round faced, flat nosed, and of a quiet demeanor; and Nechutes the less, the son of Assos, aged about forty, of middle size, sallow complexion, cheerful countenance, long face, and straight nose, with a scar upon the middle of his forehead."

COMMENTS ON CURRENT ENGLISH DECISIONS.

[Notes on December numbers of Law Reports—*Continued.*]

WILL — FORFEITURE CLAUSE — INTERFERING WITH MANAGEMENT — FRIVOLOUS ACTION AGAINST TRUSTEES.

Adams v. *Adams*, 45 Chy.D., 426, is an illustration of the old fable of "the dog and the shadow." The plaintiff was an annuitant under the will of his father, which contained a proviso that if he should in any way intermeddle with or interfere in, or attempt to intermeddle with or interfere in, the management of the testator's estate, real or personal, the annuity should cease. The plaintiff brought the present action alleging that the trustees had not paid him the annuity under the will; that they had neglected the estate, and wantonly destroyed cottages and trees, and committed other waste upon the testator's estate, so that the rents had become insufficient to pay his annuity (all of which allegations Fry, L.J., before whom the action was tried, held were unfounded), and he claimed an injunction and receiver. The defendants, by counter-claim, set up that by bringing the action the plaintiff had incurred a forfeiture of his annuity, and the court so held, and made a declaration accordingly, while dismissing the plaintiff's action. On this point Fry, L.J., said: "If the action had been really in defence of his annuity, I should have been prepared to hold that there was no attempt to meddle or interfere within the meaning of the proviso. But I am also prepared to hold that where, as in this case, there is no probable cause of action, where all the points set up by the plaintiff are trivial and the property is really in good condition, then there is an attempt to intermeddle and interfere with the management of the estate contemplated by the proviso."

INFANT—APPRENTICESHIP DEED—VALIDITY—UNREASONABLE PROVISIONS.

De Francesco v. *Barnum*, 45 Chy.D., 430, has already been referred to (see *ante* vol. 26, p. 145) when the case was before the court on a motion for an interim injunction. It may be remembered the action was brought to restrain the violation of the terms of an apprenticeship deed by the apprentices, who were infants, and to restrain third persons from enticing them away from the plaintiff's employment. The case, as against the infants, was practically disposed of by Chitty, J., on the motion for the injunction, he having decided that no action would lie at law or in equity against an infant on an apprenticeship indenture, and this point was not again seriously argued. But there is one observation which Fry, L.J., who tried the case, made on this point which seems worth re-

producing here, viz.: "I should be very unwilling to extend decisions the effect of which is to compel persons who are not desirous of maintaining continuous personal relations with one another to continue those personal relations. I have a strong impression and a strong feeling that it is not in the interest of mankind that the rule of specific performance should be extended to such cases: I think the courts are bound to be jealous, lest they should turn contracts of service into contracts of slavery." As against the third persons from whom damages were claimed for enticing the children away from the plaintiff, the case also failed, because, in the opinion of the judge, the terms of the apprenticeship deed were not beneficial to the infants, in that it imposed extraordinary obligations on them without any fairly correlative benefits. Among other things the infants were restrained during the stipulated term from accepting any other employment, whereas there was no corresponding agreement that during the term the master would himself furnish them with employment, and there was also a power to the master at any time after fair trial to put an end to the indenture if he should find the apprentices unfit, and also a power enabling him to require the infants to undertake an engagement at any theatre in England or anywhere else in the world. He therefore held that the indenture was one which was not for the benefit of, and did not bind the infants, and therefore no action would lie against the third persons by whom they were alleged to have been enticed away from the plaintiff.

BREACH OF TRUST—FOLLOWING ASSETS—STATUTE OF LIMITATIONS—PARTIES.

In re Bowden, Andrew v. *Cooper*, 45 Chy.D., 444, was an action brought by a new trustee against the personal representative of a former trustee to compel him to make good a loss occasioned by improper investments made by the former trustee more than six years prior to the action; and brings to our attention the fact that in England, under such circumstances, the defendant may successfully plead the Statute of Limitations in bar of the action, where there has been no fraud on the part of the deceased trustee; this is by virtue of the Trustee Act, 1888 (51 and 52 Vic. 59), s. 8, of which, we believe, no counterpart is yet to be found in the Ontario Statute Book. The point was raised whether the plaintiff trustee sufficiently represented his *cestui que trust*, and the court held that he did under Ord. xvi, r. 8 (Ont. *Rule* 309).

WILL—CONSTRUCTION—ANNUITY TERMINABLE ON EXPIRATION OF LEASE—GIFT-OVER ON DEATH OF A. WITHOUT "LEAVING" CHILD.

In re Hemingway, James v. *Dawson*, 45 Chy.D., 453, is a decision of Kay, J., on the construction of a will. The testator gave to his daughter Lucy an annuity during her life payable out of the rents of leasehold property, held for an unexpired term of sixty years, and after Lucy's death he directed the annuity to be paid to her child or children; and if more than one equally, who being sons should attain twenty-one, or being daughters should attain that age or marry; and in the event of the death of Lucy "without leaving" any such child, the testator gave the annuity to and among the survivors of the testator's children and grand-children. Lucy had one child who attained twenty-one, but pre-

deceased her, and the question to be determined was whether Lucy took an absolute interest in the annuity or whether the gift-over took effect. Kay, J., decided in favor of the gift-over, being of opinion that the principle of construction whereby "leaving" is sometimes construed as "having had," so as not to take away an interest previously vested, is not to be applied when the subject matter of the gift is an annuity which *ex vi termini* involves the notion of personal enjoyment, annuities standing in this respect on a different footing to a capital sum.

ADMINISTRATION ACTION—FUND CARRIED TO SEPARATE ACCOUNT—INCUMBRANCES ON SEPARATE ACCOUNT—UNDISCLOSED PRIOR CLAIM—CONTRIBUTION—RES JUDICATA—PRIORITY—STOP ORDER.

In re Eyton, Bartlett v. *Charles*, 45 Chy.D., 458. By an order funds in an administration action were directed to be carried over to the separate account of the perpetual annuity of the defendant and her issue. The defendant charged her interest in this fund, and the chargees obtained stop orders. Subsequently it was discovered that when the order was made the defendant was jointly and severally liable with the testator for breaches of trust which had been wholly made good out of the testator's estate; the plaintiff was unaware of the defendant's liability when the order to carry over the fund was made. The plaintiff applied for an order directing that out of the fund so directed to be carried over contribution should be made in respect of this liability, notwithstanding the stop orders; but Chitty, J., held that though as regards the defendant herself she could take nothing from the testator's estate until she had made good her proportion of the losses in question, still that as between the plaintiff and the incumbrancers the matter was *res judicata*, and they were entitled to priority.

In Ontario the English practice of carrying funds over to a separate account on the accountant's books has not hitherto prevailed; still it is probable the principle of this decision would apply when by a master's report duly confirmed, or by order of the court, moneys in court are found to belong to any particular person.

BUILDING SOCIETY—WINDING UP—PAST MEMBERS—LIABILITY OF PAST MEMBERS FOR LOSSES.

In re West Riding of Yorkshire Building Society, 45 Chy.D., 463, it was held by Chitty, J., that the rules of a building society constitute a contract between the society and its members, by which the liability of all classes of members is regulated; and that on a winding up, past advanced, or past investing members, who have satisfied all their obligations to the society in accordance with the rules, are no longer under any liability to contribute to the losses of the society with present members.

VOLUNTARY GIFT—INCOMPLETE GIFT—SPECIFIC PERFORMANCE—CREDITORS—PRIORITY.

In re Lucan, Hardinge v. *Cobden*, 45 Chy.D., 470, shows in a striking way the important difference between a complete and incomplete gift. In this case an annuity was granted by Earl Lucan in consideration of love and affection to one Ellen Cobden for her life, charged on certain lands and upon his "moneys, securities for money, and other effects." At the time the deed was executed

the grantor was entitled, *inter alia*, to a reversionary interest in certain railway stock standing in the names of trustees. The annuity was paid for twenty-one years, until the Earl's death. The real estate was then found to be insufficient to provide for the annuity, and his personal estate was insufficient to pay his debts. The question consequently arose whether the annuitant had a prior right over creditors in the reversionary interest in the railway stock; and Chitty, J., held that the deed did not create a perfect and complete equitable charge on the stock, because the stock was not given or transferred by the deed, and therefore that the creditors were entitled to priority.

LESSOR AND LESSEE—AGREEMENT FOR LEASE—USUAL COVENANTS—PROVISO FOR RE-ENTRY.

In re Anderton & Milner, 45 Chy.D., 476, the short point was whether, under an agreement for a lease which was to contain the usual covenants, to insure from loss by fire, repair, and pay rent and all outgoings, etc., a proviso for re-entry could be inserted, not only for non-payment of rent, but also for breach of any of the clauses, covenants, and assignments, contained in the lease. Chitty, J., held (following the rule laid down by James, L.J., in *Hodgkinson* v. *Crowe*, 10 Chy. 622) that the proviso should be confined to the non-payment of rent. It may be well to note that the lessee had paid a premium for the lease, which was also an element in the case which was considered of importance.

VENDOR AND PURCHASER—CONTRACT BY LETTERS—SPECIFIC PERFORMANCE—OFFER AND ACCEPTANCE.

Bellamy v. *Debenham*, 45 Chy.D., 481, was an action for specific performance of a contract for the purchase of land. The contract was contained in a correspondence; the defendant claimed that there had never been a complete contract. The defendant made an offer which was accepted; subsequent letters were written as to executing a contract, and some subsequent correspondence took place as to its terms; and the parties not being able to agree on its terms, the defendant refused to go on with the negotiations. It was contended that the negotiations which followed the defendant's offer and its acceptance showed that there was no complete contract, but North, J., was of opinion that where there is a clear offer and acceptance, subsequent letters showing that the vendor wished to add terms to the contract which the purchaser refused, would not entitle the latter to annul the valid contract which the offer and acceptance had created. But inasmuch as in the present case the plaintiff had caused the whole difficulty by insisting on the insertion of terms into the formal contract to which he was not entitled, he thought that it would be inequitable to enforce specific performance of the contract, and he dismissed the action without costs.

LEGACY IN LIEU OF DOWER—INTEREST.

In re Bignold, Bignold v. *Bignold*, 45 Chy.D., 496, the only point decided by North, J., was that a legacy to the testator's widow in lieu of dower bears interest only from the expiration of a year from the testator's death. Although a legacy to a widow usually carries interest from his death, yet where it is a case in which she is put to her election between the legacy and her dower, the cir-

cumstance that the legacy is not payable for twelve months after the testator's death (unless an earlier time for payment is expressly named) is one of the ingredients to be taken into account in making the election.

PARTITION ACTION—COSTS—INCUMBRANCES ON SHARES—COSTS OF INCUMBRANCES.

In *Belcher* v. *Williams*, 45 Chy.D., 510, North, J., came to the conclusion that in a partition action the costs of incumbrances on particular shares should be paid generally out of the estate, and not out of the particular shares encumbered. In *McDougall* v. *McDougall*, 14 Gr., 267, the opposite conclusion was arrived at by Vankoughnet, C., and it appears to us the latter is the preferable rule.

MORTGAGE- MORTGAGE BY COMPANY OF EQUITY OF REDEMPTION—PARTIES—DEBENTURE HOLDERS

In *Griffith* v. *Pound*, 45 Chy.D., 553, Stirling, J., dealt with two points: one, as regards the right of consolidating mortgages having regard to certain provisions of the Conveyancing and Law of Property Act, 1881, which it is not necessary to refer to here, and the other was a question of practice. A company, being the owner of an equity of redemption in mortgaged property in question, had issued debentures which were made a charge on their interest in the equity of redemption, and the present action was brought to foreclose the mortgage, and the point was raised whether it was necessary to make all the debenture holders parties, or whether some could be made parties as representatives of the whole, under Ord. xvi., r. 9 (Ont. *Rule* 315). Stirling, J., held that all of them must be made parties.

VENDOR AND PURCHASER—SALE OF BUSINESS AND GOOD WILL—RIGHT OF PURCHASER TO USE VENDOR'S NAME.

Thynne v. *Shove*, 45 Chy.D., 577, was an action by the vendor of a business with the good will, to restrain the purchaser from using the vendor's name in carrying on and advertising the business. The deed contained no express assignment of the right to use the plaintiff's name. Part of the stock in trade was a number of trade cards bearing the plaintiff's name, which the defendant used until they were exhausted, and then printed others bearing the plaintiff's name as before. The immediate object of the action was to restrain the defendant from printing or publishing such cards, or otherwise trading in the name of the plaintiff. Stirling, J., thought both parties had put their rights too high, the plaintiff in claiming to restrain the defendant *in toto* from using his name, and the defendant in claiming the right to use it without any restriction: and he granted an injunction merely restraining the defendant from using the plaintiff's name in such a way as to expose him to any liability.

MUNICIPAL LAW—LOCAL IMPROVEMENT—CHARGE UPON PREMISES FOR LOCAL IMPROVEMENT TAXES—PRIORITY OF CHARGE.

In *Tendring Guardians* v. *Dowton*, 45 Chy.D., 583, Stirling, J., held that a charge for local improvements created under a statute upon premises affected thereby, is an overriding charge upon the whole proprietorship of such premises:

and that premises held by the present owner subject to a restrictive covenant as to building may be sold for the purpose of satisfying such charge, free from such restrictive covenant.

CONFLICTING EQUITIES—NOTICE—PRIORITY.

In re Richards, Humber v. *Richards*, 45 Chy.D., 589, is a case which could hardly arise under our system of registration as regards the transfer of real estate; and yet it is interesting as illustrating the manner in which the court deals with the rights of parties where there are conflicting equities. It is the old story of two parties being defrauded by a third party and a contest between them as to which is to bear the loss. The facts were that a solicitor received in 1883 a sum of money from a client for investment, and represented to the client that he had invested it on a specified mortgage, whereas in fact the mortgage specified was one which had been previously taken by the solicitor in his own name. The solicitor paid interest on the amount of the specified mortgage to his client down to his client's death in 1885, and to his representatives down to his own death in 1888. Shortly before the solicitor's death he had deposited the title deeds of the mortgaged property with a bank as security for an overdraft of his account; and he died leaving his account overdrawn to an extent exceeding the value of the mortgage property. Immediately after the solicitor's death the bank notified the mortgagors of the deposit of the title deeds with them, and at the date of the deposit the bank had no notice of the claim on behalf of the client, and their notice was prior in point of date to any notice given by the executors to the mortgagors. Under these circumstances Stirling, J., decided that the solicitor had constituted himself trustee of the mortgage for his client, and that the latter and his representatives had not been guilty of any negligence which would deprive him or them of the prior equity, and that the bank had not acquired any priority by reason of their notice to the mortgagors being prior in time to that of the executors.

COMPANY—IRREGULAR FORFEITURE OF SHARES FOR NON-PAYMENT OF CALL—REALLOTMENT OF SHARES—DAMAGES.

In re New Chile Gold Co., 45 Chy.D., 598, Stirling, J., holds that when a board of directors of a company by resolution of the board declared certain shares, then at a premium, to be forfeited for non-payment of a call, without having previously given the holder notice in accordance with one of the articles of association, that if he failed to pay the call by the day appointed for payment, they might forfeit his shares; and where, after such irregular forfeiture, they reallotted the forfeited shares among numerous other shareholders—that on a winding up of the company the shareholder whose shares had thus been forfeited, and who was, by another article of association, restricted to a claim for damages for the irregular forfeiture, was entitled to prove in the liquidation for the damages, and was entitled so to prove his claim in competition with other creditors of the company; and he also held that a clause of the Companies' Act, 1862, which declared that "no sum due to any member of a company, in his

character of a member, by way of dividends, profits, or otherwise, shall be deemed to be a debt of the company payable to such member in case of a competition between himself and any other creditor," etc., had no application to a claim of that kind.

PRACTICE—COSTS—SEPARATE SUITS FOR SIMILAR CAUSES OF ACTION.

In re Metropolitan Coal Association, 45 Chy.D., 606, turns upon a question of costs; the point was this, two separate actions against the same defendant were conducted by the same solicitor, and were supported mainly by the same evidence; there had been no order or agreement made that the result of one should govern the other, and Kekewich, J., decided that the plaintiff in each case was entitled, on the taxation of his costs of the action, to have his own action treated as entirely distinct and independent of the other, and to have the same allowances as if the two actions had been conducted by separate solicitors and counsel, except as regards attendances or other matters which were, or ought to have been done at the same time in both cases. Thus, the costs of copies of documents and correspondence may properly be charged for in both actions if made; and no abatement can properly be made in counsel fees in either action merely because the same counsel are employed in both.

COSTS—FUND SECURED BY ACTION OF PUISNE INCUMBRANCER—PRIORITY FOR COSTS.

The only point for which it appears to be necessary here to draw attention to *Batten* v. *Dartmouth Harbor Commissioners*, 45 Chy.D., 612 is the disposition of the question of costs. The action was instituted by chargees of a harbor trust property, at whose instance a receiver had been appointed, and the moneys received by him had been paid into court. Inquiries were directed as to encumbrances, some were reported to be prior, and others subsequent to the plaintiffs'; and it was held by Kekewich, J., that the plaintiffs were entitled, in priority to the other incumbrancers, to be paid out of the fund their costs of the action so far as the other parties had had the benefit of it in securing the fund in court, and ascertaining and determining the rights of the parties.

PRACTICE—ACTION FOR ACCOUNT AGAINST LICENSEE OF PATENTEE—DISCOVERY.

Ashworth v. *Roberts*, 45 Chy.D., 623, was an action by a patentee against the defendant, his licensee, for an account. The defendant, besides denying user of plaintiff's patent, set up a plea that the process used by him was secret; and the question was to what extent the plaintiff was entitled to have discovery as to the extent to which alone, or in combination with his own, he had used the plaintiff's process. Kekewich, J., decided that in such a case the plaintiff is entitled to examine the defendant with reference to the plaintiff's specification, taking it step by step, and asking whether and to what extent he has used this or that particular process claimed in the specification, but that the examination must be so conducted as not to compel the defendant to disclose his secret process.

TENANT FOR LIFE—REMAINDERMAN—LOSS ON INVESTMENT OF TRUST FUND—APPORTIONMENT OF LOSS.

In re Foster, Lloyd v. *Carr*, 45 Chy.D., 629, a trust fund of £7535 had been invested on a mortgage. The trustees had entered into possession of the mortgaged premises, but the rents were insufficient to keep down the interest. One of the *cestui que trust* was a tenant for life, at whose death the interest in arrears on the mortgage amounted to £3400. Shortly after the death of the tenant for life the mortgaged property was sold and only realized £7005. Kay, J., was called on to determine how the loss was to be borne, and he held that it must be apportioned between the representatives of the tenant for life and the remainderman, in the proportion which the original capital of £7535, plus interest thereon at five per cent. from the time of the death of the tenant for life to the date of the sale, bore to the aggregate amount of mortgage interest (less income tax) which the tenant for life would have received had it been regularly paid, the executors of the tenant for life giving credit for what they had actually received.

WILL—REPUBLICATION OF WILL—MARRIED WOMAN—WILL EXECUTED DURING COVERTURE—TESTAMENTARY PAPER EXECUTED AFTER HUSBAND'S DEATH.

In re Smith, Bilke v. *Roper*, 45 Chy.D., 632, raised a point which Stirling, J., declared was not covered by authority. A married woman had made a will during coverture; after her husband's death she executed a testamentary paper not in anyway referring directly or indirectly to her previous will, and the question was whether this latter testamentary paper was a republication of the former will so as to make it speak from the date of republication. Although on the authorities it is clear that a codicil would have had that effect, yet Stirling, J., was of opinion that an independent testamentary paper not in anyway referring to the former will would not have that effect; and he therefore held that as to the property which the testatrix was incompetent to dispose of by will during her coverture there was an intestacy. To use the learned judge's words: "In order that republication may be implied, something must be found in the second testamentary paper from which the inference can be drawn that when making and executing it the testator considered the will as his will," *i.e.*, we presume, the first will.

APPEAL—JURISDICTION OF THE COURT OF APPEAL—HABEAS CORPUS—ORDER DISCHARGING PRISONER.

Cox v. *Hakes*, 15 App. Cas., 506, although a case arising out of an ecclesiastical suit, establishes nevertheless an important point of general interest. The House of Lords having determined that where a court of first instance discharges a prisoner from custody on a *habeas corpus*, the adjudication is final and conclusive, and no appeal lies from the decision to the Court of Appeal; whereas if a discharge be refused, it would seem that an appeal would lie in a civil action (see *Reg.* v. *Bernardo*, 23 Q.B.D., 305), though not in a criminal proceeding (see *ex parte Woodhall*, 20 Q.B.D., 832). This case is an authority upon the construction of Ont. Jud. Act, s. 43.

WILL—CONSTRUCTION—SURVIVOR AND SURVIVORS—INTESTACY.

King v. *Frost*, 15 App. Cas., 548, is the only other case to be noticed. This case is an appeal to the Judicial Committee from the Supreme Court of New South Wales upon the construction of a will whereby a specified portion of the testator's real estate, and an equal share of the residue, was devised to each of the testator's five sons for life, with remainder to their respective children, with cross remainders between them, and the will declared: "I do hereby declare that in case any or either of my said five sons shall depart this life without leaving any child or children him or them surviving, then I devise the share or shares of such son or sons unto and equally between the survivors or survivor of them my said sons and their respective heirs as tenants in common in tail." Joseph the eldest son, died without issue; then three others of the brothers died leaving issue; William, the youngest son, died last, leaving no issue; and the question was, upon his death who became entitled to the share devised to him for life? The Judicial Committee affirmed the court below in holding that on the death of William his share was undisposed of by the above clause of the will; but their Lordships were of opinion that on a point to which the attention of the court below had not been directed the judgment should be varied; this point was, that while as to the share of the residue there was an immediate intestacy, yet as to the specifically devised property, the remainder or reversion expectant on William's death without issue was caught by the residuary devised and passed under it. The following declaration of the rights of the parties was therefore made by their Lordships, viz.: "That on the death of William without issue, so much of his share as consisted of the testator's residuary real estate was undisposed of by the will, but that so much thereof as consisted of specifically devised real estate passed by the residuary devise, and stood limited upon trust for the five sons of the testator as tenants in common for life with remainders over as in the will mentioned; and that by reason of the death of Joseph without issue, his one-fifth share therein devolved upon his four brothers who survived him as tenants in common in tail; and that in the events which happened, William's one-fifth share, having already passed as residue, was undisposed of by the will." The result of the variation would appear to be, that there was an intestacy only as to William's share so far as it was residuary estate; and consequently as regards his specific share only that part of it to which he became entitled as part of the residue, was undisposed of by the will.

Notes on Exchanges and Legal Scrap-Book.

A CORRESPONDENT sends in the following item of information. As he is a barrister and gives his name, we have no reason to doubt the correctness of his information. He says that "a man was recently arrested in an unincorporated village in Western Ontario for indecent exposure and using profane language. The township where the offence was committed has a by-law regulating such

offences: and when the case came up for hearing, a subpœna was served upon the clerk to produce the original by-law; he, for some reason, was unable to do so, and of course the case was dismissed; but the J.P. imposed the costs of the prosecution upon the township, and, in default of payment, ordered the imprisonment of the Reeve for ten days. The conviction is just filed in the office of the Clerk of the Peace." The suggestion is a valuable one, and, if it could be carried out in some other cases that might be referred to, would doubtless produce beneficial results. It was, perhaps, a little hard on the Reeve, but there is no rose without its thorns, and those who are high in position should remember that "Uneasy lies the head that wears a crown."

SOME MEDICO-LEGAL POINTS—HYPNOTISM.—A demonstration showing how hypnotism may be abused by causing the commital of a crime by suggesting the deed to a subject, and also how to detect the imposture, was recently given by Dr. George Andre, at Manchester. Two subjects were taken—a man of middle age and a youth—and after being hypnotised the former was told to steal a hat, to be done a minute after being awakened, and he accordingly, acting under the impulse, did so. In the pocket of the hypnotised youth was placed an empty revolver, and it was suggested he should murder his fellow-subject at the other end of the stage. Getting on his hands and knees the boy crawled round to the man, pounced on him and flung him to the ground. On being afterwards examined by a deftly-formed court of justice, judge and jury, he explained that he bore no grudge against the man beyond a suddenly conceived dislike. A real crime, it was stated, could be detected if it were suggested while the accused was under the influence of hypnotism.—*The Law Journal.*

QUALIFICATIONS FOR THE BAR.—A well-known weekly journal recently sent one of its representatives to interview Sir Charles Russell, Q.C. Some useful advice may be gleaned from the result. With regard to the qualifications that should be possessed by a young man entering at the bar, Sir Charles Russell considers that sound health should be the first thing, and a real love of the profession the next. A man who has not a love of the work will be sure to find it intolerable drudgery. But a young man is not likely to have a real liking for the bar unless he is well fitted for it. The characteristics he should possess in order to fit him for it are good common-sense business faculties. Who was it—Swift—who said that a young man who isn't good-looking enough for the army, and has too much ability for the Church, is sent to the bar? There is some truth in that, and the consequence is that there is a greater amount of ability at the bar than in either of the other professions; but much of it is ability of the wrong kind. The profession is very much over-crowded, but for those who have the requisite qualifications there is still plenty of room. Sir Charles Russell next enunciated a very simple rule which he considered was really the great secret of success in making a jury grasp the facts of a case. However intricate and com-

plicated it might be, if the facts of a case were laid before the jury in the order of their dates, all would become plain sailing. That was the rule. It appears, therefore, that a man who is to succeed at the bar should have a power of dealing with facts in a common-sense business-like way. He should have a quick eye for the strong point in his case, and he should have the well-balanced judgment that will enable him to see the strength of his opponent's position as well as his own. He should see at a glance his own strong point, and should concentrate all his power upon it; and he should recognise the strong point of his opponent, and prepare the jury for it. We commend these very simple rules to the rising generation of barristers; their excellence is vouched for and exemplified by the experience and lofty status of the eminent advocate who has uttered them.—*The Law Journal.*

EASEMENTS OF AIR.—The law of easements has recently been carried further by a decision of Baron Pollock (*Bass* v. *Gregory*), who has decided that there may be an easement by prescription to a current of air in a defined channel. It has long been settled law that there is a distinction between water flowing in streams, whether on the surface or underground, and that which flows in undefined channels percolating through the soil or running over the surface of the land. In the case of a stream, every proprietor on its banks has a right to claim that it shall run on in its accustomed course. No one has a right to stop or divert a stream so as injuriously to affect one who has enjoyed the stream in another part of its course. Further, easements may be acquired over streams, so that by grant or prescription one man may have the right to stop a stream to the damage of another, or to increase the flow of water in a stream: (*Bealey* v. *Shaw*, 6 East, 208; *Carlyon* v. *Lovering*, 1 H. & N., 797). Similarly an easement may be acquired to discharge water over another's land by an artificial water course: (*Hill* v. *Cock*, 26 L.T. Rep. N.S., 185). But in the case of water percolating in undefined channels no such rights are recognized. Although from time immemorial one has had the benefit of such a flow of water from his neighbor's soil, no grant can be presumed; and if the neighbor chooses by sinking a well to put an end to the flow, the damaged party cannot complain. "The presumption of a grant only arises where the person against whom it is to be raised might have prevented the exercise of the subject of the presumed grant; but how could he prevent or stop the percolation of water?" (*Chasemore* v. *Richards*, 8 H.L. Cas., 349). As in the case of water, so in that of air. Air does not commonly flow in defined channels, and it was decided in *Webb* v. *Bird* (13 C.B.N.S., 841) that there cannot be an easement to have a flow of air over one's neighbor's land. Although the plaintiff had for a great number of years had the uninterrupted enjoyment of a free flow of air over his neighbor's land, inasmuch as it would have been practically impossible to prevent such a flow no presumption was raised that he enjoyed it by grant, and so he could not complain when his neighbor built so as to interfere with the free current of air. In the recent case of *Bass* v. *Gregory* (25 Q.B.D., 481), however, a dispute arose about a current of air in a defined underground channel. The plaintiff had a cellar on his land which was

ventilated by means of a shaft cut through the rock into a disused well upon the defendant's land. There was therefore a current of air passing through the shaft and up the well, and it was the right to a continuance of the enjoyment of this current of air which was in question. This current of air might have been easily stopped by the defendant, and as there was evidence from which it was inferred that the defendant knew of its existence, and he had allowed it to go on undisturbed for many years, Baron Pollock (without deciding whether it was an easement which might have been claimed under the Prescription Act) held that it was a case in which the court ought to presume a lost grant in favor of the plaintiff to the enjoyment of the current of air through the defendant's land. This case completes the analogy between easements of air and of water as suggested in *Webb* v. *Bird* and other cases.—*The Law Times.*

Reviews and Notices of Books.

The Law of Bills of Exchange and Promissory Notes, being an Annotation of the "Bills of Exchange Act, 1890." By Edward H. Smythe, one of Her Majesty's Counsel. pp. xxxii. 216. Toronto: The J. E. Bryant Company (Limited).

A short time ago we had occasion to review the full and comprehensive work of Mr. Hodgins on this Act, which, as was then remarked, has a special importance as being a successful attempt to apply the principle of codification to the "wilderness of single instances" in a leading branch of Mercantile Law. The plan of Dr. Smythe's work does not include so full a discussion and illustration of principles, but it seems to us to fulfil in large measure the design of the author, which was to present the ordinary practitioner with an edition of the Act containing, in brief compass and convenient form, such explanations as would bring out clearly its meaning, and indicate its agreement with or divergence from the law as generally understood hitherto.

The foundation for a thorough comprehension of a new Act is a due appreciation of the alterations effected by it. With this view the author has, at the outset, grouped concisely the changes introduced, in order to set forth the particulars in which the former law is varied. At pp. 2, 3, and 4, the sections and subsections which are new are enumerated in detail and in a form convenient for reference. Special attention is directed to sections 19 (2), 52, and 86, which change the law, as far as Ontario and Prince Edward Island are concerned, and abolish the distinction between bills and notes payable generally and at particular places, and make the addition of the restrictive words "only, and not otherwise or elsewhere," hereafter unnecessary for that purpose.

Care has also been taken in the notes to each section to refer to the corresponding section of the Imperial Act of 1882, which forms the basis of the Canadian Act, and to indicate the difference between the two where any exists,

so that practitioners may know how far the authority of English decisions and text-books is applicable in this country.

So far as we have been able to examine the opinions advanced by Dr. Smythe on the construction of those provisions of the Act which are new, we are glad to find ourselves in general agreement with him. It may be mentioned in this connection that in his notes to Sec. 10 (1) and Sec. 14 (3), he agrees with the view already expressed in THE CANADA LAW JOURNAL, that under the Act bills payable "at sight" are excluded from the definition of demand bills, and are therefore entitled to days of grace.

Under the title of "Crossed Cheques" at p. 142, a detailed and lucid explanation is given of the system, the introduction of which into this country is one of the most prominent features in the new Act. So far as we are aware, customers of the banks have not as yet availed themselves to any great extent of these new provisions for their benefit; but this fact only renders it the more desirable that every possible aid should be given the public and the profession towards the due comprehension of a system which has been found so advantageous elsewhere. The limits which the author's design prescribed for his work made it incumbent on him not to indulge more freely than was strictly necessary in the luxury of citing and discussing authorities, and we accordingly find that he has confined himself to the comparatively moderate number of 500 or thereabouts. These have, however, been carefully selected out of a much greater number of decisions, many of which have been rejected as being henceforth inapplicable, or as having a merely historical interest which would not warrant their citation in so small a volume.

The arrangement of the work appears to be, on the whole, convenient and satisfactory; the annotations being interspersed throughout the volume immediately after the section or subsection to which they relate, and as a part of the text, obviating the use of reference notes, and enabling the reader at a glance to refer to both without the inconvenience of turning to different pages. Cases cited are entered in foot-notes, an obviously more convenient mode than placing them in the context, where they both interrupt the sense and do not so easily catch the eye when resorted to for reference. It only remains to add that the work is provided with a good index and a useful appendix of forms, in addition to those given in the schedule to the Act. We feel it incumbent upon us to add a word as to the manner in which the publishers (The J. E. Bryant Company, Ltd.) have done their part. As our readers are aware, they are the publishers of this journal; but we do not think that this fact need hinder us from remarking upon what every intelligent purchaser of this little book will see for himself, the excellence of the paper, the size and clearness of the type, and the general freedom of the text from printers' errors, in all of which particulars it will compare favorably with any Canadian publication that we have seen. They have certainly done their part of the work excellently well; and though this is their first venture in this line, we doubt if it will be their last.

Correspondence.

THE COUNTY JUDGES AND THEIR LAW.

To the Editor of THE CANADA LAW JOURNAL :

SIR,—In a late number of THE LAW JOURNAL there appeared a *jeu d'esprit* of one of our worthy Chief Justices, who, in commenting on the statute that enables County Judges to act in other counties than their own, remarked that it was rather hard for the people of one county to have a judge coming in among them "whose law they did not understand."

The learned Chief, who rather enjoys a combat, was just then having a tilt at the Attorney-General and his Counties' Grouping Act, and was hitting at him over the backs of the County Judges.

There was some excuse formerly for a diversity in the decisions of the County judges. They had two masters to serve, and high authority tells us it is very difficult in such cases to please both. Their judgments could be carried on appeal either to the Courts of Queen's Bench or Common Pleas, at the option of the appellant: and as these courts sometimes interpreted the same law differently, the poor County Judges had a pretty hard time of it. In fact the two superior courts did not, at all times, appear to understand the law of each other.

For example, the County Judge of York decided that an execution put in the sheriff's hands prior to the registration of a bill of sale would cut out the bill of sale, though the latter were registered within the five days after it was executed. This decision was appealed to the Court of Queen's Bench, which reversed it, holding that the bill of sale took precedence. The same question again arose on precisely the same facts, and the County Judge, following the judgment of the Queen's Bench, held that the bill of sale took priority over the execution. His judgment was thereupon appealed to the Common Pleas, and the appeal was allowed, that Court deciding that the execution had priority, and holding, in effect, that the Court of Queen's Bench did not understand the law. See *Feehan* v. *Bank of Toronto*, 19 U.C.R., 474, and *Feehan* v. *Bank of Toronto*, 10 C.P., 32.

Thus whichever way the County Judge decided, his decision could be reversed by one of these courts, and no appeal lay from their decisions on county court appeals. At length the Legislature, by the Act 26 Vict., c. 46, broke the deadlock, and decided which of these courts understood the law, and which did not.

The County Judges have had a better time since the appeal from their judgments has been taken from the Queen's Bench and Common Pleas, and given to the Court of Appeal. Now, when the judges of the latter court reverse the judgment of a County Judge, as they sometimes do, he can comfort himself with the reflection that they also occasionally upset even the decisions of our worthy Chief Justice, when they cannot understand *his* law.

AMICUS CURIÆ.

[*Habet!*—"Onefor the County Judge."—"The retort courteous."—"Honors are easy."—ED. L. J.]

DIARY FOR FEBRUARY.

1. Sun.....*Sexagesima.* Sir Edw. Coke born, 1552.
2. Mon.....Hilary term commences. Criminal Assizes, Toronto. H.C.J., Q.B.D. and C.P.D. Sittings begin. County Court Non-Jury Sittings in York.
6. Fri.....W. H. Draper, 2nd C.J. of C.P., 1856.
8. Sun.....*Quinquagesima.*
9. Mon.....Union of Upper and Lower Canada, 1841.
10. Tues....Canada ceded to Great Britain, 1763.
11. Wed.....Ash Wednesday. T. Robertson appointed to Chy. Div., 1887.
14. Sat.....Hilary Term and High Court of Justice Sittings end. Toronto University burned, 1890.
15. Sun.....*1st Sunday in Lent.*
17. Tues.....Supreme Court of Canada sits.
19. Thur.....Chancery Division High Court of Justice sits.
22. Sun.....*2nd Sunday in Lent.*
24. Tues.....St. Matthias.
27. Fri.....Sir John Colborne, Administrator, 1838.
28. Sat.....Indian Mutiny began, 1857.

Reports.

ONTARIO.

WINDING-UP ACT.

[Reported for THE CANADA LAW JOURNAL.]

RE CENTRAL BANK.
BURK'S CASE.

Bank Act, ss. 20 and 29—Shareholder and Contributory—Promissory note for stock subscription—What is a valid transfer of bank shares—Costs.

A promissory note given for the payment of a percentage on shares subscribed for is not money, but only an engagement to pay money at a future time.

Therefore the giving of a promissory note, which was not paid at the time of the winding-up of a bank, is not a compliance with a statutory condition requiring the payment of a percentage on the shares subscribed for, and payable at the time of subscription, or within thirty days thereafter. And the person giving such promissory note, if he ever validly acquired any shares in the capital stock of the bank, forfeited the same by non-payment within the statutory time, and was not, therefore, liable, in the winding-up proceedings, as a contributory in respect of such shares.

A company is the creature of the law, and can act in no other manner than as the law creating it prescribes, and is not permitted to violate or evade the rules which legislature has prescribed in the public interest and for the protection of the creditors of such company.

A party, though successful, making a defence not warranted by law, may not be allowed the costs of such defence.

[MASTER-IN-ORDINARY, Sep. 1, 1890.

The facts of the case are fully stated in the judgment.

W. R. Meredith, Q.C., and *Hilton*, for the liquidators.

S. H. Blake, Q.C., and *Smellie*, for Burk.

MR. HODGINS, Q.C., MASTER-IN-ORDINARY:

This is an application by the liquidators of the Central Bank to place the respondent, D. F. Burk, on the list of contributories in respect of fifty shares of the capital stock of the bank, and for an order to stay the issue of cheques for dividends due to him in respect of his admitted claims as a creditor.

It appears that the respondent, on the 13th December, 1884, signed the stock book, agreeing to take fifty shares at $100 per share, and that he then gave to the cashier of the bank a promissory note for $500 payable on demand, being for the ten per cent. which s. 20 of the Bank Act requires to be paid at the time of subscription or within thirty days thereafter. This promissory note has not been produced, and is said not to have been among the assets of the bank when taken charge of by the liquidators. Its non-production by the bank may be held to be evidence of payment or discharge, for the maker paying a note has a right to the possession of the instrument for his own security, and as his voucher and discharge *pro tanto* in his account with the holder: *Hansard* v. *Robinson*, 7 B. & C. 94.

The case seems to be governed by the construction to given to the proviso to s. 20 of the Bank Act, which reads as follows: "No share shall be held to be lawfully subscribed for unless a sum equal to at least ten per centum on the amount subscribed for is actually paid at the time of or within thirty days after the time of subscribing."

The canon of statutory construction, where negative words are used in a statute, is that negative words make the statute imperative, while words in the affirmative may make it directory: *Rex* v. *Leicester*, 7 B. & C., 12. And as a corrollary to this comes the rule that an absolute (or imperative) enactment must be obeyed or fulfilled exactly; but it is sufficient if a directory enactment be obeyed or fulfilled substantially: Per Lord Coleridge, C.J., in *Woodward* v. *Sarsons*, L.R. 10 C.P. 746. And if I were without any guiding rules of interpretation of the policy of the statute, which is conceded to be for the protection of the public interest, I would be compelled to give effect to the policy of the legislature, even if I had doubt as to the meaning of the words used: *Broom's Legal Maxims*, (*ibd.*) 539.

But the construction to be given to the proviso referred to has been judicially determined in the case of *Re Standard Fire Insurance Co.*, 12 App., R. 486.

There, under an analogous provision in an Ontario Act, it was held that persons who had subscribed for stock in that company, but who had not paid the ten per cent. within the time limited by the charter, had not become shareholders, and could not be made contributories under the Winding-up Act.

But it is contended that the condition in the Bank Act has been waived by the respondent in giving his promissory note for the ten per cent. payable on demand, and that the case in the Court of Appeal does not apply.

A promissory note is defined by the Bills of Exchange Act as "an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person or bearer"; and the practical question here is whether such a note can be held to be a substantial compliance with the provisions of of the Bank Act as to payment. No decision in our own or in the English courts has been cited in support of this proposition; but I find ample authority and sound principles in the jurisprudence of the United States to guide me as to the right judgment on the question raised.

In *Leighty* v. *Susquehanna Turnpike Co.*, 14 Sergt. and Rawle, 434 (1826), the court, in construing an Act requiring payment in money on subscribing for shares, said: We are of opinion that the giving of a promissory note for the sum which the legislature required to be paid in money at the time of the subscription is not money. A promissory note is not money, only an engagement to pay money at a future time, which perhaps may never be complied with. If such notes were to be taken as money, the policy of the law, which required a payment in money, might be easily defeated. A company, being the mere creature of law, can act in no other manner than as the law prescribes; and cannot be permitted to enter into a contest with the legislature as to the policy or expediency which that legislature has prescribed in the public interest, and for the protection of its creditors.

In *Crocker* v. *Crane*, 21 Wend. (N.Y.) 211 (1839), the Act required a payment of two dollars per share at the time of the subscription for stock, but the directors received endorsed cheques for the subscription. It was held that such a proceeding was a mere evasion of the statute, and that it was a substitution of individual credit for the cash payment, and that a corporation so established never came into legal existence.

In *People* v. *Troy House Co.*, 44 Barb. (N.Y.) 625 (1865), under a similar provision, the learned judge said: "The clear mandate of the legislature must be obeyed. Whenever a substitute for money is tolerated, it is difficult to see why any such substitute which can come under the denomination of property may not be employed; and it necessarily leads to a troublesome examination to ascertain the true value of the proposed substitute. The statute has foreclosed any such device or transaction. Persons interested in the credit and solvency of the corporation, whether as creditors or stockholders, are entitled to this degree of protection, to wit, that the capital shall be originally paid in money. I know of no authority for dispensing with this plain provision of the law."

There are also the cases of *Henry* v. *Vermillion, etc., R. Co.*, 17 Ohio, 187 (1848); *Neuse River Co.* v. *Newbern*, 7 N.C. Jones, 275; and *Wood* v. *Coosa, etc., R. Co.*, 32 Ga., 273, and others to the same effect.

But notes so given for the preliminary subscription of stock are not void, notwithstanding the statutory condition as to membership in the company; but are enforceable by the company to which they have been given.

In *Pine River Bank* v. *Hodsdon*, 46 N.H., 114, an action was brought by the bank to recover a note given for a stock subscription, which the statute required should be paid in money. The defendant set up the provisions of the Act requiring payment in money, and contended that his note was void; but it was held that the illegality of the transaction was no defence to the action by the bank on the note.

So in *McRae* v. *Russell*, 12 Ired. (N.C.) 224, in a similar action, the learned judge said: "It is true the Act says his subscription was void unless he paid the first instalment. That only proves that no recovery could be had *on the subscription.*" But the court held that the note was not void, and that the payee could recover the amount of it.

There are, however, cases *contra*, such as *Thorp* v. *Woodhull*, 1 Sand. Ch. 411 (1844), where a cheque had been given on subscribing for stock, but was never fully paid; and *Philadelphia, etc., R. Co.* v. *Hickman*, 28 Pa. W. 318 (1857), where it was held that, after the complete incorporation of a company, with similar statutory conditions to those referred to, the company might accept payment for stock in labor or materials or in damages which the company was liable to pay, or in any other liability of the corporation, provided there was good faith. But I prefer the law of the prior cases cited, as I find their general reasoning more in harmony with what I believe to be sound law, and also more consistent with the decision of the Court of Appeal in the case cited above.

This is not a proceeding to enforce payment of the promissory note, for there is no jurisdiction in this tribunal under the Winding-up Act to give judgment on independent claims of the bank against its debtors; and a reasonable presumption may be drawn from the evidence in this case that the promissory note was given up or destroyed by the cashier.

The conclusion arrived at is that the giving of a promissory note for the ten per cent. required by the Bank Act to be paid in money, was not a compliance with the statutory condition; and that the respondent, therefore, if he ever validly acquired any shares in the capital stock of the bank, forfeited the same by non-payment of the percentage within the statutory time, and that he is not therefore now liable as a contributory; the motion of the liquidators must therefore be refused.

As to costs, the Bank Act, in equally negative and imperative words to those I have quoted as to the subscription, provides (s. 29) that no assignment or transfer of shares shall be valid unless it is made, and registered, and accepted by the person to whom the transfer is made, in a book or books kept by the directors for that purpose. No transfer of the respondent's shares can be identified in the books of the bank; but the respondent has sought by parol evidence to fit an alleged transfer of his fifty shares on to some one of the many transfers by the cashier which appear in the bank transfer-book. A contract of transfer of shares under the Bank Act as well as a contract of guarantee under the Statute of Frauds, or a contract in a bill of exchange or promissory note, must be in writing, and must contain on its face the evidence of its own identification of the parties to it; and parol evidence to identify other persons as parties to any such contract is inadmissible. The respondent has sought by parol evidence to get rid of the statutory conditions which I have cited. I can only say in the words of Lord Blackburn in *Steele* v. *McKinlay*, 8 App. Cas., 768, referring to a statute quoted: "It was thought by the legislature that there was danger of contracts of particular kinds being established by false evidence, or by evidence of loose talk, when it never was really meant to make such a contract." Nearly all the evidence on behalf of the respondent in this case is an attempt to get rid of the statutory form of transfer, or to induce a finding that some one of the many transfers made by the cashier in his own name, or as an alleged trustee fit on to his shares, is inadmissible.

No transfer of shares, however clearly it may be proved by parol evidence, is valid unless supported by the statutable evidence alone. The respondent, therefore, having rested his defence on evidence which is inadmissible, and having made no inquiry about his liability on his note or transfer of shares since 1880, has presented no merits which entitle him to costs.

Early Notes of Canadian Cases.

SUPREME COURT OF CANADA.

Nova Scotia.] [Oct. 30.

HALIFAX STREET RAILWAY *v.* JOYCE.

Appeal—Judgment on motion for new trial—R.S.C., c. 135, s. 24 (d)—Construction of—Non-jury case.

Section 24 (*d*) of the Supreme Court Act (R.S.C., c. 135), allowing an appeal "from the judgment on a motion for a new trial, on the ground that the judge has not ruled according to law," does not give the Supreme Court jurisdiction in a case tried by a judge without a jury, but is applicable to jury causes only, the expression in such section, "that the judge has not ruled according to law," referring to the directions given by a judge to a jury.

GWYNNE, J., *dubitante.*

Appeal quashed with costs.

Russell, Q.C., for the appellant.

Newcombe for the respondent.

Nova Scotia.] [Nov. 10.

KEARNEY *v.* OAKES.

Notice of action—Employer of railway department—Contractor for building government railway—Government Railway Act, 1881 (44 Vict., c. 25), s. 109.

Section 109 of the Government Railways' Act, 1881, provides that "No action shall be brought against any officer, employer, or servant of the Department" (of Railways and Canals) "for anything done by virtue of his office, service, or employment, unless within three months after the act committed, and upon one month's previous notice thereof in writing."

Held, reversing the judgment of the Supreme Court of Nova Scotia (20 N.S. Rep., 30), RITCHIE, C.J., and GWYNNE, J., dissenting, that a contractor with the Minister of Railways, as representing the Crown, for the construction of a branch to the Intercolonial Railway, is not an employee of the Department within the meaning of this section, and is not entitled to notice of an action to be brought for a trespass committed by him in the execution of his contract.

Appeal allowed with costs.

T. J. Wallace for the appellant.

R. L. Borden for the respondent.

Ontario.] [Nov. 10.

MACDOUGALL *v.* THE LAW SOCIETY OF UPPER CANADA.

Solicitor—Practising without certificate—Nominal member of firm—Professional advertisement.

The firm of M.M. & B., barristers and solicitors, published an advertisement in newspapers which stated that the firm consisted of three partners, W.M., F.M., & N.B., and the three names appeared also on the professional cards and letter headings used by the firm. W.M. not having taken out a certificate of the Law Society, entitling him to practise as a solicitor, proceedings were instituted to have him suspended from practice for three months, unless the fees to the society and a penalty of $40 were paid. In these proceedings it was shewn by the evidence of F.M., taken under an order for examination, that W.M. was not, in fact, a partner in the said firm; that an agreement of partnership had been entered into between F.M. and B., who shared all the profits and paid all the expenses of the firm; that no writs were issued in the name of the firm, but were issued in the name of B., and all proceedings in the courts were carried on in B.'s name, and that W.M. was not, at first, aware that his name would appear as an ostensible partner, though he made no objection to it afterwards. As against this, the only act of practising as a solicitor by W.M., shewn by the Society, was that the name of the firm was indorsed on certain papers filed in the Ontario courts in suits with which the firm was concerned.

Held, reversing the judgment of the Court of Appeal (15 Ont. App., 150), and of the Divisional Court (13 O.R., 204), that W.M. did not practise as a solicitor in the courts of the province within the meaning of R.S.O. (1877), c. 140, s. 21, and that he was not estopped, by permitting his name to be published as a member of a firm in active practice, from shewing that he was not, in fact, a member of such firm.

Appeal allowed with costs.

Belcourt for the appellant.

Marsh, Q.C., for the respondent.

New Brunswick.] [Nov. 10.

PHŒNIX INSURANCE CO. *v.* MCGHEE.

Marine insurance—Action for total loss—Right to recover for partial loss—Findings of jury.

A vessel was insured for a voyage from St. John's, Newfoundland, to a coal port in Cape Breton, and was stranded on the Cape Breton coast at a place where there were no inhabitants and no facilities for repairing any damage she may have suffered. The captain made his way through the woods to a place where he could telegraph to the owners, from whom he received instructions to use every means to get the vessel off as she was only half insured, and to communicate with the owners' agent at Sydney. In response to a telegram to the agent, a tug was sent to the place where the vessel was, and the master of the tug, after examining the situation of the vessel, refused to attempt to pull her off the rocks. About a fortnight later one of the owners came to the place and caused a survey to be held on the vessel, and after receiving the surveyor's report he had her sold at auction, realizing only a trifling amount.

In an action on the insurance policy for a total loss, the only evidence as to the loss was.

that of the captain of the vessel, who stated what the tug had done, and swore that, in his opinion, the vessel could not have been got off the rocks. The jury found, in answer to questions submitted to them, that the vessel was a total loss in the position they considered she was in, and that a notice of abandonment would not have benefited the underwriter. A verdict was given for the plaintiff, which the court *in banc* sustained.

Held, per RITCHIE, C.J., and STRONG, J., that the jury having found the vessel to be a total loss, and that finding being one that reasonable men might have arrived at on the evidence, it should not be disturbed by an appellate court.

Per TASCHEREAU, GWYNNE, and PATTERSON, JJ., that as the vessel existed in specie for some time after she was stranded, and there being no satisfactory evidence that she could not have been got off and repaired, there was no total loss.

Per RITCHIE, C.J., STRONG, and PATTERSON, JJ., that if the verdict for a total loss could not stand there should be a new trial, the plaintiff being entitled in this form of action to recover as for a partial loss.

Appeal allowed and new trial ordered.

C. A. Palmer for the appellant.

Barker, Q.C., for the respondent.

Ontario.]

GODSON *v.* CITY OF TORONTO ET AL.

Prohibition—Restraining inquiry ordered by city council—R.S.O. (1887), c. 184, s. 477—Functions of county court judge.

The Council of the City of Toronto, under the provisions of R.S.O. (1887), c. 184, s. 477, passed a resolution directing a county court judge to inquire into dealings between the city and persons who were or had been contractors for civic works with a view of ascertaining in what respect, if any, the system of the business of the city in that respect was defective, and if the city had been defrauded out of public monies in connection with such contracts. G., who had been a contractor with the city, and whose name was mentioned in the resolution, attended before the judge, and claimed that the inquiry as to his contracts should proceed only on specific charges of malfeasance or misconduct, and the judge, refusing to order such charges to be formulated, he applied for a writ of prohibition.

Held, affirming the judgment of the court below, GWYNNE, J., dissenting, that the county court judge was not acting judicially in holding this inquiry; that he was in no sense a court and had no power to pronounce judgment imposing any legal duty or obligation on any person, and he was not, therefore, subject to control by writ of prohibition from a superior court.

Held, per GWYNNE, J., that the writ of prohibition would lie and in the circumstances shewn it ought to issue in this case.

Appeal dismissed with costs.

McCarthy, Q.C., and *T. P. Galt*, for appellant.

Aylesworth for respondent.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

Full Court.] [Dec. 31.

REGINA *v.* MILFORD.

Criminal law—Fortune telling—9 Geo. II., c. 5.

The statute 9 Geo. II., c. 5, is in force in this province. By the statute the mere undertaking to tell fortunes constitutes the offence; and a conviction was affirmed where it was obtained upon the evidence of a person who was not a dupe or victim, but a decoy.

J. R. Cartwright, Q.C., for the Crown.

Murdoch for the prisoner.

Full Court.] [Dec. 31.

REGINA *v.* POPPLEWELL.

Criminal law—Threatening letter—Accusation of abortion—"Not less than seven years," meaning of.

A crime punishable by law with imprisonment for not less than seven years means a crime the minimum punishment for which is seven years; and as no minimum term is prescribed for the crime of abortion, sending a letter threatening to accuse a person of that crime is not a felony within the meaning of R.S.C., c. 173, s. 3.

J. R. Cartwright, Q.C., for the Crown.

George Lindsey for the prisoner.

Full Court.] [Dec. 31.

REGINA *v.* PETRIE.

Criminal law—Trial of prisoner by judge without jury—Right of judge to view locality of offence—Absence of prisoner—Question of law arising on trial.

The prisoner was tried without a jury by a county court judge, exercising jurisdiction under the Speedy Trials Act, upon an indictment for feloniously displacing a railway switch. After hearing the evidence and the addresses of counsel, the judge reserved his decision. Before giving it, having occasion to pass the place, he examined the switch in question, neither the prisoner or any one on his behalf being present. The prisoner was found guilty.

Held, that there was no authority for the judge taking a "view" of the place and his so doing was unwarranted; and even if he had been warranted in taking the view, the manner of his taking it, without the presence of the prisoner or of anyone on his behalf, was unwarranted.

Held, also, that the question whether the judge had the right to take a view was a question of law arising on the trial, and was a proper question to reserve under R.S.C., c. 174, s. 259.

Dymond for the Crown.

Middleton for the prisoner.

Div'l Ct.] [Dec. 31.

CANN *v.* KNOTT.

Execution—Free grants and homesteads—Exemption from execution—Interest of original locatee as mortgagee after alienation.

The judgment of BOYD, C., 19 O.R., 422, affirmed on appeal.

Foy, Q.C., for the defendant, Elizabeth Knott.

D. Urquhart for the plaintiff.

Div'l Ct.] [Dec. 31.

WESTERN ASSURANCE CO. *v.* ONTARIO COAL CO.

Insurance, marine—General average contribution—Attempt to rescue vessel and cargo—Common danger—Average bond—Adjustment—Expenditure—Liability of owners of cargo.

The judgment of BOYD, C., 19 O.R., 462, affirmed on appeal.

Osler, Q.C., and *A. W. Aytoun-Finlay*, for the plaintiffs.

Delamere, Q.C., and *D. Urquhart*, for the defendants.

Chancery Division.

Div'l Ct.] [Dec. 11.

PEUCHEN *v.* IMPERIAL BANK OF CANADA.

Sale of goods—Implied warranty of title—Failure of consideration—Bill of lading—Transfer of interest under—Absolute sale by pledgees—Findings of jury—Inconsistency—Duty of trial judge.

The plaintiffs sued the bank to recover the price paid the bank for certain goods which, owing to a customs seizure and forfeiture, the plaintiffs never received.

The bank was never in actual possession of the goods but a bill of lading was indorsed to them as security for advances, and this bill of lading was indorsed and delivered by the bank directly to the plaintiffs.

The jury found that it was the bank which sold the goods to the plaintiffs; that they professed to sell with a good title; that they had not a good title; and that the plaintiffs could not by any diligence have obtained the goods.

Held, that upon these findings and the evidence the transaction must be regarded as a sale by the bank as pledgees with the concurrence of the pledgor, and not as a mere transfer of the interest of the bank under the bill of lading; and that the plaintiffs were entitled to recover the price as upon an implied warranty of title and a failure of consideration.

Morly v. *Attenborough*, 3 Ex., 500, commented on and distinguished.

Held, also, per ROBERTSON, J., that the trial Judge was within his right and duty in sending the jury back to reconsider their findings after pointing out their inconsistency.

Osler, Q.C., and *A. McLean Macdonell*, for the plaintiffs.

Bain, Q.C., for the defendants.

Practice.

STREET, J.] [Dec. 30.

DORAN *v.* TORONTO SUSPENDER CO.

Sheriff's interpleader—Who should be plaintiff in issue—Material on sheriff's application—Barring execution creditor.

Where goods seized by a sheriff under execution are at the time in the possession of the execu-

tion debtor, and the sheriff interpleads in consequence of a claim made upon them by a person out of possession, the claimant should be plaintiff in the interpleader issue. In order to entitle himself to an interpleader order, the sheriff is not obliged to shew that the claim of the person out of possession is open to objection.

Where upon an interpleader application the execution creditor declines to contest the right of a claimant, the order should absolutely bar the execution creditor of any right to contest the claim.

Hilton for the claimants.

C. Millar for the execution creditor.

R. J. Maclennan for the sheriff.

Q.B. Div'l Ct.] [Dec. 31.

CLARKE *v.* CREIGHTON.

Costs—Set-off — Rule 1205—Solicitor's lien—Appeal from order—Waiver—Amount in question—Dignity of court.

Where judgment was given for payment by the plaintiff to the insolvent defendant of the costs of the action, and the defendant's solicitors were by an order of court declared to have a lien upon such judgment and to have the sole right to control the judgment and execution to the extent of their costs between solicitor and client, and the plaintiff became entitled against the defendant to costs of garnishing proceedings upon the judgment, begun before the lien was declared,

Held, reversing upon this point the decision of BOYD, C., 14 P.R., 34, that Rule 1205 did not apply to enable a set-off of the costs to be made.

Where two appeals in respect of matters wholly separate and distinct were disposed of by one order,

Held, that a party might appeal from the decision in respect of one of the appeals, while taking advantage of the decision in respect of the other.

It is not beneath the dignity of the court to determine an appeal where the amount involved is less than $40.

The plaintiff in person.

C. Millar for the defendant's solicitors.

C.P. Div'l Ct.] [Jan. 5.

JONES *v.* MACDONALD.

Judgment debtor — Unsatisfactory answers — Motion to commit—Proof of service of appointment, etc.—Proof of character of examination —Ex parte certificate of examiner.

Where, upon a motion to commit a party for unsatisfactory answers upon his examination as a judgment debtor, it is shewn that he attended and submitted to be sworn and examined, it is not necessary to prove service of an appointment or payment of conduct money. And where the depositions returned by the examiner shew on their face that the party was being examined as a judgment debtor, there need be no other proof of the fact.

The certificate of an examiner is good evidence of the proceedings before him, notwithstanding that it was settled *ex parte*.

Re *Ryan* v. *Simonton*, 13 P.R., 299, commented on.

W. R. Smyth for plaintiff.

W. M. Douglas for defendant.

BOYD, C.] [Jan. 9.

FROTHINGHAM *v.* ISBISTER.

Discovery — Examination and production of documents—Assignee for creditors— Quasi-plaintiff.

In an action by creditors of a firm to establish the liability of the defendant as a partner therein, it appeared that the assignee of the firm for the benefit of creditors, who had received all the papers of the firm, was interested in the success of the action, had instigated its being brought, and was providing material in the way of documents, etc., to the plaintiffs for its efficient prosecution.

Held, that although the assignee might have no direct beneficial interest in the result, he was to be regarded for the purposes of discovery as a quasi-plaintiff, and the defendant was entitled to have production of all documents in the possession of the assignee, and to examine him for the purpose of such production.

D. E. Thomson, Q.C., for the plaintiffs.

W. Nesbitt for the defendant, James Isbister.

Aylesworth, Q.C., for the assignee.

BOYD, C.] [Jan. 2.

DONOVAN *v.* HALDANE.

Appeal to Court of Appeal—Undertaking not to appeal—Notice of appeal and appeal bond—Power of court below to set aside.

A judgment of the High Court of Justice contains an undertaking by the plaintiff not to appeal therefrom; notwithstanding which the plaintiff filed and served notice of appeal to the Court of Appeal, and also filed the usual bond for security for costs.

Held, that the action was not removed out of the High Court of Justice into the Court of Appeal; the notice and bond were irregular and unwarrantable proceedings, and the High Court being still seized of the case, could interfere, by virtue of its inherent jurisdiction, to set them aside.

Donovan, the plaintiff, in person.

C. Millar for the defendants.

STREET, J.] [Jan. 23.

HOPE *v.* TRADERS' BANK.

Costs—Taxation—Proof of documents.

Other means having been provided by statute for proving documents at the trial of actions, the costs of obtaining orders for subpœnas to public officers to produce documents, and of procuring the attendance of such officers at trials, should not be allowed on taxation except where it is clearly shewn that the documents could not be proved in any other way.

W. H. Blake for plaintiff.

Lefroy for defendants.

Law Society of Upper Canada.

THE LAW SCHOOL, 1891.

LEGAL EDUCATION COMMITTEE.

CHARLES MOSS, Q.C., *Chairman.*

C. ROBINSON, Q.C. Z. A. LASH, Q.C.
JOHN HOSKIN, Q.C. J. H. MORRIS, Q.C.
F. MACKELCAN, Q.C. J. H. FERGUSON, Q.C.
W. R. MEREDITH, Q.C. N. KINGSMILL, Q.C.

This notice is designed to afford necessary information to Students-at-Law and Articled Clerks, and those intending to become such, in regard to their course of study and examinations. They are, however, also recommended to read carefully in connection herewith the Rules of the Law Society which came into force June 25th, 1889, and September 21st, 1889, respectively, copies of which may be obtained from the Secretary of the Society, or from the Principal of the Law School.

Those Students-at-Law and Articled Clerks, who, under the Rules, are required to attend the Law School during all the three terms of the School Course, will pass all their examinations in the School, and are governed by the School Curriculum only. Those who are entirely exempt from attendance in the School will pass all their examinations under the existing Curriculum of The Law Society Examinations as heretofore. Those who are required to attend the School during one term or two terms only will pass the School Examination for such term or terms, and their other Examination or Examinations at the usual Law Society Examinations under the existing Curriculum.

Provision will be made for Law Society Examinations under the existing Curriculum as formerly for those students and clerks who are wholly or partially exempt from attendance in the Law School.

Each Curriculum is therefore published herein accompanied by those directions which appear to be most necessary for the guidance of the student.

CURRICULUM OF THE LAW SCHOOL, OSGOODE HALL, TORONTO.

Principal, W. A. REEVE, Q.C.

Lecturers: E. D. ARMOUR, Q.C.
A. H. MARSH, B.A., LL.B., Q.C.
R. E. KINGSFORD, M.A., LL.B.
P. H. DRAYTON.

The School is established by the Law Society of Upper Canada, under the provisions of rules passed by the Society with the assent of the Visitors.

Its purpose is to promote legal education by affording instruction in law and legal subjects to all Students entering the Law Society.

The course in the School is a three years' course. The term commences on the fourth Monday in September and closes on the first Monday in May; with a vacation commencing on the Saturday before Christmas and ending on the Saturday after New Year's Day.

Students before entering the School must have been admitted upon the books of the Law Society as Students-at-Law or Articled Clerks. The steps required to procure such admission are provided for by the rules of the Society, numbers 126 to 141 inclusive.

The School term, if duly attended by a Student-at-Law or Articled Clerk is allowed as part of the term of attendance in a Barrister's chambers or service under articles.

The Law School examinations at the close of the School term, which include the work of the first and second years of the School course respectively, constitute the First and Second Intermediate Examinations respectively, which by the rules of the Law Society, each student and articled clerk is required to pass during his course; and the School examination which includes the work of the third year of the School course, constitutes the examination for Call to the Bar, and admission as a Solicitor.

Honors, Scholarships, and Medals are awarded in connection with these examinations. Three Scholarships, one of $100, one of $60, and one of $40, are offered for competition in connection with each of the first and second year's examinations, and one gold medal, one silver medal, and one bronze medal in connection with the third year's examination, as provided by rules 196 to 205, both inclusive.

The following Students-at-Law and Articled Clerks are exempt from attendance at the School.

1. All Students-at-Law and Articled Clerks attending in a Barrister's chambers or serving under articles elsewhere than in Toronto, and who were admitted prior to Hilary Term, 1889.

2. All graduates who on the 25th day of June, 1889, had entered upon the *second* year of their course as Students-at-Law or Articled Clerks.

3. All non-graduates who at that date had entered upon the *fourth* year of their course as Students-at-Law or Articled Clerks.

In regard to all other Students-at-Law and Articled Clerks, attendance at the School for one or more terms is compulsory as provided by the Rules numbers 155 to 166 inclusive.

Any Student-at-Law or Articled Clerk may attend any term in the School upon payment of the prescribed fees.

Students and clerks who are exempt, either in whole or in part, from attendance at The Law School, may elect to attend the School, and to pass the School examinations, in lieu of those under the existing Law Society Curriculum. Such election shall be in writing, and, after making it, the Student or Clerk will be bound to attend the lectures, and pass the School examination as if originally required by the rules to do so.

A Student or Clerk who is required to attend the School during one term only, will attend during that term which ends in the last year of his period of attendance in a Barrister's Chambers or Service under Articles, and will be entitled to present himself for his final examination at the close of such term in May, although his period of attendance in Chambers or Service under Articles may not have expired. In like manner those who are required to attend during two terms, or three terms, will attend during those terms which end in the last two, or the last three years respectively of their period of attendance, or Service, as the case may be.

Every Student-at-Law and Articled Clerk before being allowed to attend the School, must present to the Principal a certificate of the Secretary of the Law Society shewing that he has been duly admitted upon the books of the Society, and that he has paid the prescribed fee for the term.

The Course during each term embraces lectures, recitations, discussions, and other oral methods of instruction, and the holding of moot courts under the supervision of the Principal and Lecturers.

During his attendance in the School, the Student is recommended and encouraged to devote the time not occupied in attendance upon lectures, recitations, discussions or moot courts, in the reading and study of the books and subjects prescribed for or dealt with in the course upon which he is in attendance. As far as practicable, Students will be provided with room and the use of books for this purpose.

The subjects and text-books for lectures and examinations are those set forth in the following Curriculum:

FIRST YEAR.

Contracts.

Smith on Contracts.

Anson on Contracts.

Real Property.

Williams on Real Property, Leith's edition.

Common Law.

Broom's Common Law.

Kerr's Student's Blackstone, books 1 and 3

Equity.

Snell's Principles of Equity.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

SECOND YEAR.

Criminal Law.

Kerr's Student's Blackstone, Book 4.

Harris's Principles of Criminal Law.

Real Property.

Kerr's Student's Blackstone, Book 2.

Leith & Smith's Blackstone.

Deane's Principles of Conveyancing.

Personal Property.

Williams on Personal Property.

Contracts and Torts.

Leake on Contracts.

Bigelow on Torts—English Edition.

Equity.

H. A. Smith's Principles of Equity.

Evidence.

Powell on Evidence.

Canadian Constitutional History and Law.

Bourinot's Manual of the Constitutional History of Canada. O'Sullivan's Government in Canada.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to the above subjects as shall be prescribed by the Principal.

THIRD YEAR.

Contracts.

Leake on Contracts.

Real Property.

Dart on Vendors and Purchasers.

Hawkins on Wills.

Armour on Titles.

Criminal Law.

Harris's Principles of Criminal Law.

Criminal Statutes of Canada.

Equity.

Lewin on Trusts.

Torts.

Pollock on Torts.

Smith on Negligence, 2nd edition

Evidence.

Best on Evidence.

Commercial Law.

Benjamin on Sales.

Smith's Mercantile Law.

Chalmers on Bills.

Private International Law.

Westlake's Private International Law.

Construction and Operation of Statutes.

Hardcastle's Construction and Effect of Statutory Law.

Canadian Constitutional Law.

British North America Act and cases thereunder.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

During the School term of 1890-91, the hours of lectures will be 9 a.m., 3.30 p.m., and 4.30 p.m., each lecture occupying one hour, and two lectures being delivered at each of the above hours.

Friday of each week will be devoted exclusively to Moot Courts. Two of these Courts will be held every Friday at 3.30 p.m., one for the Second year Students, and the other for the Third year Students. The First year Students will be required to attend, and may be allowed to take part in one or other of these Moot Courts.

Printed programmes showing the dates and hours of all the lectures throughout the term, will be furnished to the Students at the commencement of the term.

GENERAL PROVISIONS.

The term lecture where used alone is intended to include discussions, recitations by, and oral examinations of, students from day to day, which exercises are designed to be prominent features of the mode of instruction.

The statutes prescribed will be included in and dealt with by the lectures on those subjects which they affect respectively.

The Moot Courts will be presided over by the Principal or the Lecturer whose series of lectures is in progress at the time in the year for which the Moot Court is held. The case to be argued will be stated by the Principal or Lecturer who is to preside, and shall be upon the subject of his lectures then in progress, and two students on each side of the case will be appointed by him to argue it, of which notice will be given at least one week before the argument. The decision of the Chairman will be pronounced at the next Moot Court, if not given at the close of the argument.

At each lecture and Moot Court the roll will be called and the attendance of students noted, of which a record will be faithfully kept.

At the close of each term the Principal will certify to the Legal Education Committee the names of those students who appear by the record to have duly attended the lectures of that term. No student will be certified as having duly attended the lectures unless he has attended at least five-sixths of the aggregate number of lectures, and at least four-fifths of the number of lectures of each series during the term, and pertaining to his year. If any student who has failed to attend the required number of lectures satisfies the Principal that such failure has been due to illness or other good cause, the Principal will make a special report upon the matter to the Legal Education Committee. For the purpose of this provision the word "lectures" shall be taken to include Moot Courts.

Examinations will be held immediately after the close of the term upon the subjects and text books embraced in the Curriculum for that term.

The percentage of marks which must be obtained in order to pass any of such examinations is 55 per cent. of the aggregate number of marks obtainable, and 29 per cent. of the marks obtainable on each paper.

Examinations will also take place in the week commencing with the first Monday in September for students who were not entitled to present themselves for the earlier examination, or who having presented themselves thereat, failed in whole or in part.

Students whose attendance at lectures has been allowed as sufficient, and who have failed at the May examinations, may present themselves at the September examinations at their own option, either in all the subjects, or in those subjects only in which they failed to obtain 55 per cent. of the marks obtainable in such subjects. Students desiring to present themselves at the September examinations must give notice in writing to the Secretary of the Law Society, at least two weeks prior to the time fixed for such examinations, of their intention to present themselves, stating whether they intend to present themselves in all the subjects, or in those only in which they failed to obtain 55 per cent. of the marks obtainable, mentioning the names of such subjects.

Students are required to complete the course and pass the examination in the first term in which they are required to attend before being permitted to enter upon the course of the next term.

Upon passing all the examinations required of him in the School, a Student-at-Law or Articled Clerk having observed the requirements of the Society's Rules in other respects, becomes entitled to be called to the Bar or admitted to practise as a Solicitor without any further examination.

The fee for attendance for each Term of the Course is the sum of $10, payable in advance to the Secretary.

Further information can be obtained either personally or by mail from the Principal, whose office is at Osgoode Hall, Toronto, Ontario.

The Canada Law Journal.

VOL. XXVII. FEBRUARY 16, 1891. No. 3.

THE article which recently appeared in this journal on grand juries seems to have attracted a good deal of attention. In this number we publish a letter on the same subject. We promised to return to the matter again and take up the question of some substitute for the grand jury system. An article on this subject has, however, to stand over until next issue from want of space. We shall be glad for any further views from correspondents who have considered the matter.

IN the *Law Times* of the 17th ult. certain rules of practice are published relating to the retainers of counsel, etc., which have been adopted by the Council of the Incorporated Law Society, and approved by the Attorney-General. We draw attention to these rules because we think something of the kind is needed in Ontario. At present members of the bar and solicitors have no authoritative standard to guide them in the matter of retainers. It is in the interest both of the profession and the public, we think, that some rules on this point should be laid down for the guidance of the profession, and the matter should not be left in its present indefinite and undefined condition. This is a subject which, we think, might not unreasonably engage the attention of the Law Society.

SEVERAL changes of importance have recently been made in the English judiciary, consequent on the death of Sir Barnes Peacock. In the first place, Sir James Hannen, who for eighteen years past has presided over the Probate, Divorce, and Admiralty Division, has been made Lord of Appeal in Ordinary, and will take the vacant place of Sir Barnes Peacock in the Judicial Committee. To supply the vacancy thus created in the P. D. and A. Division, Mr. Justice Butt, the *puisne* Judge of the P. D. and A. Division, has been made President of that Division, and Mr. Jeune, Q.C., has been made a *puisne* Judge *vice* Butt, J. In the valedictory address made by Mr. Inderwick, Q.C., to Sir James Hannen, the learned gentleman characterized Sir James' administration of the law as having been distinguished by "courage, courtesy, and kindliness;" and yet, in his reply, the learned president candidly confessed that he had frequently been irritable, and with some emotion asked pardon of any member of the bar whose feelings he might have hurt. Next to avoiding irritability on the bench comes, in point of merit, the honest confession that it is a fault. Whatever faults of temper the learned judge may have manifested, however, one fact speaks volumes for his successful administration of the law, and that is the remarkably few appeals that have been had from his decisions.

THE late decision of the Court of Appeal in *Wright* v. *Bell*, 18 Ont. App., 25, we take to be a further illustration, if any be needed, of the doctrine established by the Supreme Court in *Gray* v. *Richford*, 2 S.C.R., 431, that where a man is in possession of property to which he has a paper title, he cannot be allowed to repudiate his paper title and set up that his possession was wrongful, so as, under the Statute of Limitations, to cut out the rights of others entitled under the paper title, whether as remaindermen or as *cestuis que trustent*. The right to repudiate an estate granted or devised unquestionably exists, and though that repudiation need not be by record or deed, it must at least be by conduct plain and unequivocal. This rule of law applies both to real and personal property: see *Standing* v. *Bowring*, 31 Chy.D., 282; and where a person to whom property is devised or conveyed in trust refuses the office of trustee, not even the bare legal estate will vest in him under the will or conveyance: see *Birchall* v. *Ashton*, 40 Chy.D., 439, per Lindley, L.J. In *Moffatt* v. *Scratch*, 12 Ont. App., 157, this doctrine of repudiation is discussed, and we have there an instance of what was held to be an effectual repudiation of a grant. In addition to the cases referred to in *Wright* v. *Bell*, there are some others in our own court on which this question has been adjudicated upon, *e.g.*, *Re Dunham*, 29 Gr., 258; *Re Defoe*, 2 Ont., 623. The distinction drawn by the Divisional Court of the Chancery Division in *Smith* v. *Smith*, 5 Ont., 690, and which appears to have been approved by the Court of Appeal, is important to be borne in mind, viz., that though a person entering into possession under a will, or other instrument, may be, and generally is, estopped from disputing the title of the devisor or grantor, yet he is not estopped from asserting that the instrument is ineffectual to convey to third parties the rights they claim under it. In that case a party entered into possession under a will made by a married woman, which was void; and it was held that the party so entering into possession might nevertheless rely on its invalidity as against other persons claiming under it.

COMMENTS ON CURRENT ENGLISH DECISIONS.

The Law Reports for January comprise (1891) 1 Q.B., pp. 1-142. (1891), 1 P., pp. 1-8, and (1891), 1 Ch. pp. 1-65.

It will be seen that, with the commencement of this year, a new method of citation has been adopted for the Law Reports. This change is probably made in the interests of the publishers, so as to obviate, if possible, the reluctance of new subscribers to commence subscribing in the middle of a series. Each year in future will be as it were a new starting point. The making of the year a part of the citation, though somewhat cumbrous, will probably be found convenient after we have once become accustomed to it.

BILL OF SALE—BILLS OF SALE ACT, 1878 (41 & 42 VICT., C. 31), S. 4—HIRING AND PURCHASE AGREEMENT.

Beckett v. *Tower Assets Co.* (1891), 1 Q.B., 1, is a case which seems to us to illustrate the apparent ease with which unscrupulous and greedy money-lenders

can evade the wholesome restraints which the rules of equity have imposed upon mortgagees. The action was brought for trespass to the plaintiff's goods, and arose in the following way: The plaintiff was in difficulties and unable to pay his rent; he applied to the defendants for an advance upon a chattel mortgage. They recommended him not to give a mortgage but to get his landlord to put in a friendly distress, under which they would buy in the goods, and then give him the right to repurchase them. The terms on which the repurchase was to be allowed were not then named. The distress was made and the defendants bought the goods for £29 15s., and on the plaintiff going the next day to complete the hire and repurchase, he found that the terms the defendants fixed involved his repaying them £50; this, after expostulation, he submitted to do. He was unable to pay the £50 as stipulated, and the defendants seized and sold the goods under the hire and purchase agreement, and for so doing the action was brought. For the plaintiff it was contended that the hire and purchase agreement was in effect a chattel mortgage, and was void for non-registration under the Bills of Sale Act; but Cave, J., held that it was a hire and purchase agreement and not within the Act, and the action was therefore dismissed. We are not altogether satisfied with the view the learned Judge took. He appears to have considered that because the defendants could not, after they became the purchasers of the goods, have compelled the plaintiff to repay the advance, that therefore the defendants became the absolute owners of the goods; whereas it seems to us that the purchase having been made under the circumstances it was, the plaintiff, whether he could have been compelled to repay the advance or not, had nevertheless a clear equity of redemption, and that in equity the transaction really was a mortgage. Under the Ontario Act (R.S.O., c. 125), it is almost needless to point out, that even if the transaction amounted to a chattel mortgage, its non-registration could not be set up by the mortgagor, but only by his creditors or subsequent purchasers, or mortgagees, in good faith.

SHIP—BILL OF LADING—CHARTER PARTY—DEMURRAGE—FIXED NUMBER OF LAY-DAYS—DELAY OCCASIONED BY STRIKE—INABILITY TO PERFORM SHIP'S SHARE OF UNLOADING.

In *Budgett* v. *Binnington* (1891), 1 Q.B., 35, the plaintiffs, who were indorsers of a bill of lading, claimed to recover from the defendants, who were ship-owners, a sum of money paid by the plaintiffs, under protest, for demurrage. The cargo was shipped under a bill of lading incorporating a clause of the charter party, which fixed the number of lay-days for unloading and allowed other days for demurrage. Neither the bill of lading nor the charter party contained any exception of delays caused by strikes. By the custom of the port of discharge, the cargo was required to be discharged by the joint act of the ship-owner and the consignees. During the lay-days a strike took place, both among the laborers employed by the stevedore of the ship-owners and by the consignees, so that the unloading ceased and could not be resumed until after the expiration of the lay-days. The plaintiffs claimed that the ship-owners were themselves unable to perform their part of the unloading, and they were therefore not entitled to charge demurrage for the period they were in default. The

Court of Appeal (Lord Esher, M.R., and Lindley and Lopes, L.JJ.) were of opinion that the defendants were not responsible for the delay occasioned by the strike, as the laborers were not directly responsible to the defendants, but to the stevedore by whom they had been employed; though they agreed that if the delay had been occasioned by the defendants, or by any persons in their control, they could not have charged demurrage for the delay so occasioned.

SHIP—CHARTER PARTY—FREIGHT PAYABLE IN ADVANCE—LOSS OF CARGO—LIABILITY OF CHARTERER.

Smith v. *Pyman* (1891), 1 Q.B., 42, is another maritime case, in which the question was whether a charter party which provided "one-third of freight, if required, to be advanced, less 3 per cent. for interest and insurance," entitled the ship-owner to demand the advance after the loss of the cargo had occurred. Charles, J., before whom the action was tried, held that the plaintiff was entitled to recover. The *ratio decidendi* may be collected from the following passage: "Advance freight has been decided over and over again to be a payment made for taking the goods on board, and for the undertaking to carry, not for the safe carriage of them; and that being the nature of advanced freight, it has been held, first, that if it has been paid in advance, it cannot be got back again even though the vessel be lost; and secondly, that if there has been an unconditional agreement to pay advance freight, that agreement can be enforced although the vessel has been lost before action be brought or demand made." The only difficulty the learned Judge felt was as to the effect of the words "if required," but he came to the conclusion that they could not be read as limiting the ship-owner's right to require payment only before the loss of the vessel.

PUBLIC HEALTH ACT (38 & 39 VICT., C. 55), SS. 116, 117 (R.S.O., C. 205, S. 99)—UNSOUND MEAT—POSSESSION OF UNSOUND MEAT INTENDED FOR HUMAN FOOD—EXPOSURE FOR SALE, WHETHER NECESSARY TO CONSTITUTE OFFENCE.

Mallinson v. *Carr* (1891), 1 Q.B., 48, was a case stated by justices for the opinion of the court. The defendant was a butcher, who was charged with having in his possession meat for the purpose of preparation for sale and intended for human food, which was unsound and unfit for food. The prosecution took place under the Public Health Act, 1875 (see R.S.O., c. 205, s. 99), and the question submitted was, whether the defendant could be convicted for having the meat in his possession notwithstanding that he had not actually exposed it for sale. Hawkins and Stephens, JJ., held that he could.

MINE—MINES REGULATION ACT, 1872 (35 & 36 VICT., C. 77), S. 23 (53 VICT., C. 10, S. 23, S-S. 11 (O.))—"WORKING SHAFT."

Foster v. *North Hendre Mining Co.* (1891), 1 Q.B., 71, was also a case stated by justices. The defendants were charged with a breach of the Mines Regulation Act, 1872 (see 53 Vict., c. 10, s. 23, s-s. 11 (O.)). The Act provides "every working shaft in which persons are raised" shall, under certain specified circumstances, be provided with guides, and persons contravening this provision are made liable to a penalty. The shaft of the lead mine in question was completed, and a tunnel driven from the bottom of it for the purpose of arriving at

the ore, but no ore had been taken. The men employed in the mine were drawn up in a bucket unprovided with guides, which was the offence charged. The defendants contended that the shaft in question was, under the circumstances above stated, not a "working shaft," but the court (Hawkins and Stephens, JJ.) held that it was, and that the defendants were therefore liable to the penalty, and that it was immaterial whether ore had been obtained or not; it was sufficient that the shaft was being used for the purposes of the mine.

FOREIGN POWER OF ATTORNEY, CONSTRUCTION OF—CONFLICT OF LAWS—ENGLISH LAW, HOW FAR APPLICABLE TO FOREIGN POWER OF ATTORNEY

Chatenay v. *The Brazilian Submarine Telegraph Co.* (1891), 1 Q.B., 79, was an action brought by plaintiff to compel the defendants to rectify their register of shareholders and restore his name as owner of certain shares which had been transferred in assumed exercise of a power of attorney executed by the plaintiff in Brazil in the Portuguese language in favor of a broker resident in London. A preliminary issue had been directed in the action to determine whether the construction of the power of attorney was to be governed by Brazilian or English law, which issue was tried before Day, J., who decided that it must be governed by English law, and on appeal the Court of Appeal (Lord Esher, M.R., and Lindley and Lopes, L.JJ.) affirmed his decision, holding that in such a case the meaning of the instrument is to be ascertained by the evidence of competent translators and experts, including, if necessary, lawyers of the country where the document was executed, and that if it appears that it was the intention of the donor of the power that it should be acted on in England, then as to anything done under it in England its construction is to be governed by English law, and the certificate of Day, J., was expanded in accordance with this holding.

TRESPASS TO THE PERSON—WOUNDING WITH GUN—ACCIDENT—ABSENCE OF NEGLIGENCE.

In *Stanley* v. *Powell* (1891), 1 Q.B., 86, the plaintiff sought to recover damages for injuries sustained in consequence of a pellet from the defendant's gun having glanced off the bough of a tree and struck the plaintiff. The jury found the defendant was not guilty of negligence, and the court (Denman, J.) held that he was not liable to the plaintiff.

DEFAMATION—LIBEL—CORPORATION, WHEN IT MAY MAINTAIN ACTION FOR LIBEL.

Manchester v. *Williams* (1891), 1 Q.B., 94, was an action for libel brought by a municipal corporation. The libel complained of charged the plaintiffs with bribery and corruption. Day and Laurance, JJ., were of opinion that the action would not lie, and that the limits of a corporation's right to bring such an action were correctly stated by Pollock, C.B., in *Metropolitan Saloon Omnibus Co.* v. *Hawkins*, 4 H. & N., 90, viz., that a corporation may sue for a libel affecting property, but not for one merely affecting personal reputation.

PRACTICE—RENEWAL OF WRIT OF SUMMONS—STATUTE OF LIMITATIONS.

In *Hewett* v. *Barr* (1891), 1 Q.B., 98, the Court of Appeal (Lord Esher, M.R., Lopes and Kay, L.JJ.) affirmed the rule of practice laid down in *Doyle* v. *Kauf-*

man, 3 Q.B.D., 7, 340, to the effect that a renewal of writ of summons will not be granted when, in the absence of such renewal, the claim of the plaintiff would be barred by the Statute of Limitations. The old system of keeping claims alive by issuing a writ, and keeping it renewed, is dead. Kay, L.J., held, however, that under exceptional circumstances there should be a discretion to depart from this rule, *e.g.*, where every reasonable effort had been made to serve the writ without success.

PRACTICE—DEFENDANT OUT OF JURISDICTION—SUBSTITUTED SERVICE OF WRIT—ORD. IX., R. 2; ORD. X. (ONT. RULE 253).

In *Wildhing* v. *Bean* (1891), 1 Q.B., 100, the same point of practice came up which was decided in *Fry* v. *Moore*, 23 Q.B.D., 395 (see *ante* vol. 25, p. 536), that where a writ is issued in ordinary form for service within the jurisdiction, and the defendant before the issue of the writ had left England and had ever since remained out of England, and it did not appear that he had gone out of the jurisdiction to avoid service of the writ, in such a case an order for substituted service of the writ could not be made, and where such an order had been made it was set aside, on the application of the defendant, by the Divisional Court, and this decision was affirmed by the Court of Appeal (Lord Esher, M.R., and Lindley and Lopes, L.JJ.). As Lord Esher, M.R., says, the writ under the circumstances could not have been served on the defendant abroad personally, because it was not in the proper form for service abroad, and, therefore, there could not be substituted service of it. We are inclined to think this distinction has not heretofore been very strictly observed in Ontario in making orders for substituted service of writs.

PRACTICE—SERVICE OUT OF JURISDICTION—"CONTRACT WHICH, ACCORDING TO THE TERMS THEREOF, OUGHT TO BE PERFORMED WITHIN THE JURISDICTION"—ORD. XI., R. 1 (E), (ONT. RULE 271 (E).)

In *Bell* v. *Antwerp L. & B. Line* (1891), 1 Q.B., 103, the Court of Appeal, affirming Cave and Day, JJ., determined that where a foreign company chartered an English ship from England to a foreign port, and by the terms of the charter party it was stipulated that all lighterage should be at charterers' or consignees' risk and expense, the charterers indemnifying the ship-owners from all lighterage on cargo at the port of discharge; but no place was specified for payment of monies that might become due under such contract of indemnity; such a contract was not one which, "according to the terms thereof," ought to be performed within the jurisdiction within the meaning of Ord. xi., r. 1 (*e*), (*Ont. Rule 271* (*e*)), and therefore leave to serve notice of the writ out of the jurisdiction on the foreign company in an action founded on such a contract could not be given. The court held that the words "according to the terms thereof" in the rule could not be disregarded; although it would seem from the observations of Kay, L.J., that it is not absolutely necessary that the terms should be actually expressed in the contract, and that it is sufficient if they are necessarily implied therefrom.

CRIMINAL LAW—MISAPPROPRIATION BY AGENT—ACCEPTANCE OF BILL OF EXCHANGE—BILL INCOMPLETE AT TIME OF DELIVERY—SECURITY FOR PAYMENT OF MONEY—24 & 25 VICT., C. 96, S. 75 (R.S.C., C. 164, S. 60).

The Queen v. *Bowerman* (1891), 1 Q.B., 112, was a case stated by the Recorder

of London. The prosecutors, being desirous of raising money on their acceptances, entered into an agreement in writing with the prisoner, that he should draw bills on them up to a certain amount, which they should accept, and that the prisoner should endeavor to get the bills discounted and pay the plaintiffs a certain proportion of the proceeds; or upon failure to get them discounted, return the bills to the prosecutors. Bills were accordingly accepted by the prosecutors and delivered to the prisoner, but at the time of the delivery the name of the drawer had not been signed. His own name was subsequently signed by the prisoner as drawer, and he got the bills discounted and converted the whole proceeds to his own use. The question submitted was (1) whether the bills of exchange when entrusted to the prisoner were securities for the payment of money, and (2) whether there was evidence that they had been entrusted to the prisoner as a broker or agent. Upon both points the court (Denman, J., Pollock, B., and Hawkins, Stephens, and Charles, JJ.) decided against the prisoner.

ADMIRALTY—DAMAGES—COLLISION—JOINT TORTFEASORS.

The Avon and Thomas Jolliffe (1891), P. 7, is the only case in this number of the Probate Division which it is necessary to refer to. A tug and a vessel in tow had been found to blame for a collision, and damages awarded against them jointly. The defendants applied to amend the judgment by inserting words to the effect that each of the wrong-doing vessels was severally liable for one-half only of the entire damage. Two American cases were relied on in support of the motion, but Butt, J., held that according to the law of England there can be no apportionment of damages in favor of joint tortfeasors, and that that rule applied to admiralty as well as all other cases.

PRACTICE—SECURITY FOR COSTS—ASSETS WITHIN JURISDICTION

In re Apollinaris Co. (1891), 1 Ch., 1, a foreign company appealed from an order to the Court of Appeal, and the respondent applied for an order for security for costs of the appeal. The appellants showed that they had a branch business as mineral water merchants in England, which they carried on in leasehold premises, where they had a stock in trade worth £12,000; plant, horses, and vans, worth about £1200, and a large amount of book debts. The respondents contended that this was floating property, easily removable, and afforded no sufficient security. The Court of Appeal (Lord Halsbury, L.C., and Bowen and Fry, L.JJ.), however, was of opinion that there was no reasonable doubt that if the appeal were dismissed with costs the respondents would find ample goods on which to levy execution, and therefore refused the order.

CONFLICTING EQUITIES—LEGAL ESTATE—FRAUD—INNOCENT PARTIES.

Taylor v. *Russell* (1891), 1 Ch., 8, is a case which, though under our system of registration of deeds, unlikely ever to arise here, nevertheless may be referred to as illustrating the importance still attached to the acquisition of the legal estate in cases where there are conflicting equities. By the fraud of a mortgagor, two mortgages were made to the plaintiff and defendants: to the defendants he

exhibited his true title, and handed over the genuine title deeds; and to the plaintiff he pretended he claimed under another title by virtue of a deed to himself, which he had forged, and which he handed over to the plaintiff, who believed he had a good legal mortgage. This was a species of fraud which, in this country, it would be difficult, if not impossible, to perpetrate. At the time the mortgages were made it so happened that the legal estate was outstanding in prior mortgagees. As soon as the fraud was discovered the defendants, who were second mortgagees in point of date, after notice of the plaintiff's claim, procured a conveyance of the legal estate to themselves, and it was held, by Kay, J., that they had by that means acquired priority over the mortgage of the plaintiff, which was prior in point of time.

SETTLEMENT—FRAUD ON CREDITORS—13 ELIZ., C. 5, S. 5—PURCHASER FOR VALUE WITHOUT NOTICE.

In *Halifax Banking Co.* v. *Gledhill* (1891), 1 Ch., 31, Kay, J., was called on to decide a question upon which he observes that it was strange there was no direct decision. The action was brought to set aside a settlement as a fraud on creditors, and one of the defendants, without notice of the fraud, had for valuable consideration obtained a charge on the settlor's reversionary life interest thereunder; and the question was whether, notwithstanding the settlement was found to be fraudulent as against creditors, the rights of this defendant were protected by 13 Eliz., c. 5, s. 5. Kay, J., held that they were. The settlement was therefore declared void as against creditors, except as to the reversionary life interest of the settlor thereunder, which was directed to be valued, and its value deducted from the proceeds of the property and applied in payment of the charge.

STATUTE—CONSTRUCTION—"OWNER."

Fillingham v. *Wood* (1891), 1 Ch., 51, deserves a brief notice here. A statute required a notice to be given to an "adjoining owner," and the term "owner" was by the statute defined to apply to every person in possession or receipt either of the whole, or any part of, the rents or profits of any land or tenement, or in the occupation of such land or tenement, other than as tenant from year to year, or for any less term. The question Chitty, J., had to decide was whether a tenant in possession of part of a house under an agreement for a greater interest than as tenant from year to year was an "owner" within the meaning of the Act, and he held that he was, and that in such a case service only on the person in the receipt of the whole of the rents and profits of the premises was an insufficient compliance with the Act, as the word "owner" included everyone within the language of the interpretation clause, even though their interests were merely equitable.

Notes on Exchanges and Legal Scrap Book.

MONEY PAID UNDER ILLEGAL CONSIDERATION.—The law as to recovering back moneys paid under illegal contracts is in a most unsatisfactory state, as appears from the considered judgment of the Court of Appeal in *Kearley* v. *Thompson and Ward.* . . . . There £40 was paid to induce the defendants, acting as solicitors for a petitioning creditor, not to oppose a bankrupt's discharge. The bankrupt never came up for discharge, and it was sought to recover the money. Clearly the illegal contract had not been completely performed, but nevertheless the court held that the payer had no *locus pœnitentiæ*, the parties were *in pari delicto*, and the money must remain where it was. Some tribunal some time or other will have to deal with expressions used by Lord Justice Mellish and Lord Esher. The former said in *Taylor* v. *Bowers* (34 L.T. Rep. N.S., 938; Q.B.D., 291): "If money is paid or goods delivered for an illegal purpose, the person who had so paid the money or delivered the goods may recover them back before the illegal purpose is carried out." The latter said, in *Herman* v. *Jeuchner* (15 Q.B.D., at p. 563; 53 L.T. Rep. N.S., 94); "In this case the illegal purpose has been wholly performed and therefore the plaintiff cannot recover." Now it must be taken that, although the contract has not been wholly performed, money paid cannot be recovered back; and consequently we suppose if nothing is done under it at all the same rule applies.—*Law Times.*

THE LAW'S DELAY.—They are supposed to do some things better in France than in England, but so far as the delays and expenses of legal process are concerned the two countries stand in much the same position. A gentleman who lived at Neuilly travelled for years daily between that suburban locality and the Madeleine by tramway. He was a great favorite with the drivers and conductors, to whom he gave *pourboires* frequently, in addition to presents at the New Year. Three years ago he died, bequeathing to the drivers and conductors of his favorite tramway line the sum of £1,600, which meant £40 to each employee, there being forty men thus engaged. The deceased's family, however, attacked the will, and the case went before the law courts. For three years counsel and solicitors have debated and argued, but at last the proceedings have come to an end, the court holding that the legacy was valid and duly executed. On the 5th inst., the forty tramway-men concerned received a circular informing them of this fact, and asking them to call at the office to receive their share of the money. When they did so they were told that instead of the original £40 each one was entitled to only 6s. 9d., all the rest of the money having gone in costs! As they took this miserable remnant of their deceased benefactor's munificence some of them remarked that it was well the suit had ended now, or else, instead of even getting even 6s. 9d., they might have been called upon to contribute something out of their own pockets to enable the lawyers to plead and counter-plead.—*Irish Law Times.*

DEFRAUDING THE SLOT-BOX.—A complicated case was brought into the Central Police Station yesterday afternoon. It was that of a man who had succeeded in beating a "drop-a-nickel-in-the-slot" box, on the corner of Third and Jefferson streets. The man who was able to perform this feat was John Lewis, and he is said to have made a thorough study of the subject before risking his nickel. He first bored a hole in the coin and then fastened to it a small black silk thread. He then dropped the nickel in the slot as directed by the sign and drew out a cigar. Seeing that nothing was stated in the directions as to how many times one nickel could be dropped in, he drew his nickel out and dropped it in again. Succeeding the second time, he continued to drop until he emptied the box. By the time he had drawn the twenty-ninth cigar, quite a crowd had gathered around him, and cheered him on. Their cries attracted officers Schradel and Donohue, who arrested Lewis and took him from the circle in which he had become a hero. At the station-house the question arose as to what he should be charged with. After several suggestions of robbery, burglary, etc., it was decided to place against him disorderly conduct. He was taken out on bond a little later by some of those whose cries had attracted the police.—*Louisville Courier-Journal.*

MALICIOUS PROSECUTION BY A COMPANY.—This question has for years past been an open one. There is a good deal of authority on either side of it, and within the last few days it has reappeared before Baron Pollock in the case of *Kemp* v. *Courage & Co., Limited; Croft* v. *Courage & Co., Limited* ("*Times*," Nov. 11, 1890). It is one of the open pitfalls in our law, which is kept open by the protests of Lord Bramwell, like that of the failure to prosecute a felon (*Ex parte* Ball; *Re* Shepherd, 40 L.T. Rep. N.S., 141; 10 Chy.D., 667; *Roope* v. *D'Avigdor*, 48 L.T. Rep. N.S., 761; 10 Q.B.D., 412). A review, therefore, of the existing position of the question of an action lying against a company for malicious prosecution needs no apology.

The earlier cases upon the question are not directly in point, as they only bear upon it by analogy. In *Rex* v. *City of London* (cited in a note to *Whitfield* v. *South-Eastern Railway Company*, E.B. and E., 122) it was held on demurrer that an action would lie against the corporation of the City of London for maliciously publishing a libel. And in Whitfield's case (*ubi sup.*), Lord Campbell said that "the ground on which it is contended that an action for a libel cannot possibly be maintained against a corporation aggregate, fails." And further, "Considering that an action of tort and trespass will lie against a corporation aggregate, and that an indictment may be preferred against a corporation aggregate, both for commission and omission, to be followed up by fine, though not by imprisonment, there may be great difficulty in maintaining that, under certain circumstances, express malice may not be imputed to and prevail against a corporation." It is clear law nowadays that a corporation may be liable for the publication of a libel. Even Lord Bramwell admits that. The unfortunate word "malice," complains Lord Bramwell, has got into cases of action for libel. "We all know that a man may be the publisher of a libel without a particle of

malice or improper motive. Therefore the case is not the same as where actual and real malice is necessary. Take the case where a person may make an untrue statement of a man in writing, not privileged on account of the occasion of its publication; he would be liable, although he had not a particle of malice against the man. So would a corporation. Suppose that a corporation published a newspaper or printed books, and suppose that it was proved against them that a book so published had been read by an officer of the corporation, in order to see whether it should be published or not, and that it contained a libel; no action for libel lies there, because there is no question of actual malice, or ill-will, or motive": *Abrath* v. *North-Eastern Railway Company*, 55 L.T. Rep. N.S., 63; 11 App. Cas., 247, at p. 254.

It is clear then, upon the authorities, that an action for libel will lie against a company or corporation. It may be noticed in passing, that within the last few weeks it has been decided by Justices Day and Lawrence that a municipal corporation cannot sue for libel: *Mayor, etc., of Manchester* v. *Williams*, 90 L.T., 21. The defendant in the recent case charged two if not three departments of the Manchester City Council with bribery and corruption, and accused the plaintiffs with either participating in these offences or with culpable ignorance of them. The decision is hard to reconcile with that in the *Metropolitan Saloon Omnibus Company* v. *Hawkins*, 4 H. & N. 87, in which the defendant imputed to the company insolvency, mismanagement, and an improper and dishonest carrying on of its affairs, and it was expressly held that the company could maintain an action. In that case, however, Chief Baron Pollock went so far as to say that a corporation cannot sue in respect of a charge of corruption, "for a corporation can not be guilty of corruption, though the individuals composing it may." The question, therefore, whether a corporation can or can not sue for libel must be considered an open one, though it is clear law that a corporation can be sued for libel.

We return to the question, can an action for malicious prosecution be brought against a corporation? To elucidate this more difficult question let us turn again to the authorities: In *Stevens* v. *Midland Counties Railway Company, and Lander*, 10 Exch., 362, which was an action against the defendants for having maliciously and without reasonable or probable cause prosecuted the plaintiff on a charge of having feloniously received some of the property of the company, Baron Alderson and his brethren held that there was abundant evidence for the jury that the act done by Lander was done without reasonable and probable cause and maliciously. Not so with the railway company. But Baron Alderson added that he thought that an action of this description does not lie against a corporation aggregate; for, in order to support the action, it must be shewn that the defendant was actuated by a motive in his mind, and a corporation has no mind. Baron Platt, however, thought the argument that a company is not responsible, as they have no motive, a very weak one. In the next case (*Green* v. *London General Omnibus Company*, 7 C.B.N.S., 290), it was held that a corporation aggregate may be liable to an action for intentional acts of misfeasance by its servants, provided they are sufficiently connected with the scope and object of its incorporation. And Chief Justice Earle remarked that the doctrine relied on, that a corporation having

no soul can not be actuated by a malicious intention, is more quaint than substantial. In other words, the *ratio decidendi* of Baron Alderson was in this case disregarded.

Coming now to the more modern decisions, which are two in number, we find a remarkable difference of judicial opinion. In *Edwards* v. *Midland Railway Co.*, 43 L.T. Rep. N.S., 694; 6 Q.B.D., 287, Lord (then Mr.) Justice Fry declined to follow *Stephens* v. *Midland Railway Company (ubi. sup.)*. There the question arose *simpliciter*, Can a railway company be made liable in an action for malicious prosecution? "Yes," said the judge; "the malice in order to found such an action need not be express malice, but it may be implied from the wrongful action without just cause or excuse. Now, it is a maxim that a corporation has no mind, no *mens rea*, therefore they cannot be guilty of malice; can they therefore escape the consequences of an action which in the case of an ordinary person would be held to imply malice? Counsel suggests to me the case of partners who would be individually liable for an action maliciously instituted by the partnership, and the subsequent incorporation of the partnership into a company; can it be said that the company, consisting of the same persons as before, is not to be made liable for the same wrongful action? It would be strange if it were so, though I must not forget that the individuals who directed such a wrongful action on the part of the company would be personally liable." It was upon this reasoning that Lord Justice Fry refused to follow in the steps of Baron Alderson, which till that day (1880) stood alone. Since that day, however, the House of Lords has decided the case of *Abrath* v. *North-Eastern Railway Company*, 1886; 55 L.T. Rep. N. S., 63; 11 App. Cas., 247.

In Abrath's case the judge, in the action against the railway company for malicious prosecution, directed the jury that it was for the plaintiff to establish a want of reasonable and probable cause and malice, and that it lay on him to show that the defendants had not taken reasonable care to inform themselves of the true facts of the case, and asked the jury whether they were satisfied that the defendants did take reasonable care to inform themselves of the true facts and that they honestly believed in the case which they laid before the magistrates. The jury answered both questions in the affirmative, and the judge entered judgment for the defendants; and the House of Lords held that the direction was right and the judgment rightly entered. It will be seen from this brief statement of the case that it was not necessary for the judgment in Abrath's case to lay down a general rule that an action for malicious prosecution does not lie against a corporation aggregate, a corporation aggregate being incapable of malice or motive. This, however, is what Lord Bramwell did. Lord Selborne pointed out that that important question had not been argued, and was not made the ground of the decisions in the courts below. So that the House of Lords can not be said to have spoken together upon the question whether it is of the essence of an action for malicious prosecution that malice should be proved in a sense not imputable to the corporation. But Lord Bramwell, speaking alone and for himself only, did deliver himself of a strong opinion that no action for malicious prosecution will lie against a corporation. This he laid down, to use

his own words, "directly and peremptorily." His reasoning may be summarized: To maintain an action for a malicious prosecution it must be shewn that there was an absence of reasonable and probable cause, and that there was malice, or some indirect or illegitimate motive in the prosecutor. But a corporation is incapable of malice or motive. "If," said Lord Bramwell, "the whole body of shareholders were to meet, and in so many words to say, 'Prosecute so and so, not because we believe him guilty, but because we believe it will be for our interest to do it,' no action would lie against the corporation, though it would lie against the shareholders who had given such an unbecoming order. If the directors even by resolution at their board, or by order under the common seal of the company (I am putting the case strongly in order that there may be no mistake about it), were maliciously, with the view of putting down a solicitor who had assisted others to get damages against them, to order a prosecution against that man, if they did it from an indirect or improper motive, no action would lie against the corporation, because the act on the part of the directors would be *ultra vires;* they would have no authority to do it. They are only agents of the company; the company acts by them, and they have no authority to bind the company by ordering a malicious prosecution. I say, therefore, that no action lies, even if you assume the strongest case, namely, that of the very shareholder directing it, or the very director ordering it, because it is impossible that a corporation can have malice or motive; and it is perfectly immaterial that some subordinate officer or individual or individuals of a company have such malice or motive." And again: "It is not enough to show that there was an absence of reasonable and probable cause, and that a subordinate had malice." Nothing could be stronger than these expressions of Lord Bramwell's evidently well considered judgment. But we repeat that they were repudiated by the other law lords as *obiter dicta* pronounced upon a question which had not been argued in the court. They stand, therefore, alone, and with the weight of Lord Bramwell's *ipse dixit*, but with nothing more.

How, then, did Baron Pollock find the authorities the other day? On the one hand, we have Lord Justice Fry laying down in plain terms that an action for a malicious prosecution will lie against a company, following the analogous decisions in *Rex* v. *City of London*, *Whitfield* v. *South-Eastern Railway Company*, and *Green* v. *London General Omnibus Company* (*ubi sup.*), as well as the instances of actions against corporations for false returns to writs of mandamus which, declared Lord Ellenborough, must be numberless: *Yarborough* v. *Bank of England*, 16 East, 6. On the other hand, we have the dictum of Baron Alderson and the plain-spoken words of Lord Bramwell, to the effect that an action for malicious prosecution will not lie against a corporation aggregate. With these rival authorities Baron Pollock was confronted, and he, without expressing any decided opinion of his own, preferred to follow the ruling of Lord Justice Fry, which was that adopted, he said, in other cases subsequently. This being so, he gave judgment against Courage & Co., and in our humble opinion he was right in so doing. Both Baron Alderson and Lord Bramwell's opinions were given *obiter*, and they were based upon the well-known saying that a corporation has

no qualities by which it can be condemned, either morally or physically. In this argument we can see no substance, and we should be glad if the defendants in the recent case would take the question, which is certainly an open one, to the appellate tribunals, and so obtain an authoritative ruling upon an interesting point.—*The Law Times.*

Correspondence.

GRAND JURIES.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—It is to the great difference in the mode of procedure, and to the many changes in the criminal law which favor an accused person, that we may look for an intelligent reason for believing that the grand jury inquest has now lost its utility.

It is only necessary to mention the principal amendments leading up to our present code to show how a criminal prosecution must have weighed heavily against the prisoner before it was recognized that something more than the intervention of a grand jury was required if justice and humanity were not to remain strangers to his defence.

It would appear that the grand jury was the tribunal first to receive and investigate the charge against a prisoner; that there was no formal charge or investigation prior to their inquest. If a true bill was presented, prior to the reign of King Henry II., there was no petit, special, or other kind of jury, to try the indictment. The trial was by ordeal or *battel.* After what delay such inhuman proceedings, founded on superstitious barbarity, were completed, we can only conjecture; but we may fairly conclude that these trials did not follow the presentment of the grand jury with as little delay as trials do now.

Then, without directing our attention to the class of men who first became petit jurors, their vassalage and dependence, and the nature of penalties imposed, when we consider the trial by such a jury at its earliest inception and for centuries after, we can only wonder, if the grand jury was then regarded as a bulwark of British liberty, that a true bill was ever found, unless the guilt of the prisoner was so clear that a trial by another jury would manifestly be a useless and superfluous proceeding.

The Habeas Corpus Act was not passed until the reign of King Charles II. It was not until after the time of the Reformation that legal proceedings were translated into the English language. Prior to the reign of William III., it is doubtful if prisoners were allowed to defend by counsel. They were liable to be tried although absent. They were not entitled to a copy of the indictment or to the names of the jurors, and had not any available process of the court for compelling attendance of witnesses. It was not until Queen Anne's reign that witnesses were allowed to give evidence for a prisoner in cases of felony. That the

rules of evidence were not so favorable to prisoners as at the present time can be readily believed without strict investigation; and that for a very long period jurors were liable to be fined and imprisoned for giving a verdict contrary to the directions of the Judge, is a fact that is beyond question.

What has been accomplished, therefore, in favor of the individual by amendments to our criminal law is so great that it could hardly be ascribed to any advantage possessed by the Crown should any innocent person now be found guilty by a common jury, and it would not be an act of the prisoner consistent with his innocence should he attempt to evade a public trial.

That he does not place any particular advantage in the intervention of a grand jury is evident from the fact of so many electing to be summarily tried before a single Judge.

The magistrates who now receive and investigate criminal charges are independent of the people, yet governed by the interests of the community. They are better qualified to sift and weigh the evidence submitted than the ordinary grand juror, and in this respect they are far superior to the magistrates whose committals were first investigated at the Courts of Assize.

That a magistrate will occasionally commit a person where the circumstances do not quite justify the delay, expense, and trouble, which the prisoner would be put to in order to defend himself before a higher tribunal, is perhaps true. But when it is considered that the worst is done, so far as the man's character is concerned, by the public charge before the magistrate, and that an acquittal in open court by a petit jury is a more satisfactory expurgation than the return by a grand jury of a Scotch verdict of "not proven," the trifling expense and delay of a trial should have little weight with innocent men.

And this objection, if it is one, to the abolition of grand juries, can be met by giving to the presiding Judge at the trial a discretionary power of awarding to a discharged prisoner his reasonable expenses, where the facts and circumstances presented do not appear to have justified his committal.

But beyond, and in addition to all the circumstances before mentioned, there is a power before the throne which is able to protect the interests of the prisoner and curb any arbitrary or eccentric tendencies of a magistrate far better than the historic grand jury ever did or can. I refer to the greatest of all grand juries, the public press. A man is no sooner placed under arrest than all the known facts and circumstances connected with the crime are, by the agency of the press, presented to the public. And so great has the power of this unimpanelled grand jury become during the present century, that notwithstanding certain restrictures, the verdict of a jury is generally anticipated, and it is not an uncommon practice for counsel to brief the evidence for the trial from newspaper clippings.

Yet it is owing to this increasing power of the press that another important question relative to the grand jury system has arisen. With the exposition of the multifarious characters and incidents of human life, the press have also exposed not only the existence of public or class prejudices, but a growing tendency towards creating them.

Now, should it happen that grand jurors become influenced by public or class prejudices, the trial will not be forwarded nor the prisoner suffer thereby, no matter how strong the influence may be in favor of the Crown; but should such prejudices favor the prisoner, the power is in the hands of the grand jurors, or a majority of them, to prevent a trial, although the facts pointing towards a criminal act seem clear and are not likely to be disputed.

It is claimed that a very notable instance of this kind occurred in Hamilton not long ago.

The other important question for consideration, therefore, is, whether the grand jury system is likely to become an element in the administration of criminal justice detrimental to the interests of the community.

We may be slow to abolish this ancient institution merely because it has outlived its usefulness; if, however, there is any ground for believing that it not only does not offer any special protection to innocent prisoners, but may be made subservient to an improper administration of the law, the sooner it is abolished the better.

One good effect of abolishing grand juries would be that a better class of men would be available to serve as petit jurors. If the governors of gaols and asylums should miss the visits of the former, it will be because they have been accustomed to put their houses in order to receive them, a circumstance that has perhaps caused only a sleeping security on the part of the public familiar with the report as to good order and cleanliness which invariably follows the expected periodical visits of these grand inquisitors.

Yours, etc.,

Hamilton, Jan. 24th, 1891. GEO. FRED. JELFS.

Proceedings of Law Societies.

COUNTY OF YORK LAW ASSOCIATION.

ANNUAL REPORT OF THE BOARD OF TRUSTEES FOR 1890.

To the Members of the County of York Law Association:

GENTLEMEN—The trustees, in presenting their fifth annual report, congratulate the members upon the continued prosperity of the association.

The membership now numbers 375; 32 new members subscribed for stock during the year.

The fees of seven members residing in Toronto are in arrear; the fees of seven members who have removed from Toronto without withdrawing from the association also remain unpaid.

Two hundred and twenty-three volumes have been added to the library during the year. There are now one thousand nine hundred aud forty-seven volumes of useful books in the library. During the year, Mr. Read, Q.C., the historian of the association, presented to the association a valuable series of

reports, and Mr. Angus MacMurchy procured from the Provincial Governments gifts of the statutes of the different provinces.

Under the direction of the trustees, the librarian lately visited some of the principal libraries in Boston, and made herself acquainted with the system of card cataloguing.

The librarian is now engaged in the preparation of a catalogue which will form an index to the subjects treated in the books contained in the library and to the articles published from time to time in the various legal periodicals.

The trustees have given much consideration to the plans of the new court house, and have made many suggestions to the architect which, if carried into effect, will be of benefit to the public and the profession.

The last consolidation of the Ontario Statutes did not comprise the provisions of the statute R.S.O,, 1877, cap. 168, respecting library associations.

Doubts have arisen as to the mode of securing the incorporation of new Law Associations, and the trustees have submitted to the Attorney-General a draft statute which, if passed, will enable new associations to become incorporated without difficulty.

The growth of Toronto and an increased jurisdiction has given rise to an enormous increase of work in the Division Court of the city and county. The work of the Junior Judge has doubled since his appointment five years ago, and unless some relief is soon given him his health must give way.

Litigants are subjected to the greatest inconvenience and hardship owing to the present press of business in the Division Courts, and to the inability of the Junior Judge to hold more frequent sittings of that court.

The trustees, having made careful enquiry, suggest the appointment of a third County County Judge as a necessity. Upon this Judge should be imposed the duty of holding weekly Division Court Sittings in Toronto, and of sitting in chambers every day when not sitting in court.

The trustees suggest that the attention of the Government be called to the present state of affairs, which is well known to many members of the association, and to the necessity for the immediate adoption of the suggestion that a third Judge be appointed.

The Board of Trustees, having learned that a proposal was to be made by the registrars of the several divisions of the High Court to have rules passed to secure uniformity of practice in the several divisions, applied for and were kindly furnished with a copy of some of the suggestions made.

While your Board, in the interest of the profession, highly approve of the suggestions made in many, though not in all respects, they are decidedly averse to the rules being amended as suggested, for the following reasons:

1. The inconsistencies of practice have arisen from the disagreement of the officers as to the construction of various rules. The same rule generally and practically is in force in each division; the interpretation is different. Hence what is required is not an amendment of the rule, which again may produce diverse interpretations, but agreement amongst the officials, or if that is impossible, an arbitrary interpretation by some superior.

2. Some of the suggestions made tend towards a further separation rather than a consolidation of the Divisional Courts. The rules as consolidated tend towards a consolidation; and in the opinion of your Board, they are the result of a quasi compact between the Bench and the Bar Associations to remedy the evils that undoubtedly existed before. These rules are suspended by the operation of a rule which was passed merely to postpone the coming into operation of the consolidation until a convenient period. Your Board believe that it would be a violation of that compact to retrograde in any particular, and they take this opportunity of expressing their opinion that the rule suspending the operation of the consolidating rule should be repealed, and that unity and uniformity should be established in all matters.

Arrangements have been made with the county authorities which will make the room adjoining the present library available as a reading-room.

The trustees again record their appreciation of the services of the librarian. Under her care, the books have been kept in good order, the reports have been noted to date, and no books have been lost from the library since its formation.

The historian of the association during the year published the life of Governor Simcoe, another valuable addition to the history of this province.

An extract from the report of the Inspector upon the library of the association accompanies this report.

The trustees record with deep regret the death during the year of two members: Mr. A. J. Cattanach, Q.C., and Mr. J. H. Morris, Q.C.

The particulars required by the by-laws accompany this report as follows:

1. The names of members admitted during the year.
2. The names of members at the date of the report.
3. A list of books contained in the library.
4. A list of books added to the library during the year.
5. A list of periodicals received during the year.
6. A detailed statement of the assets and liabilities of the association at the date of this report, and of the receipts and disbursements during the year.

The treasurer's accounts have been duly audited and the report of the auditors will be submitted to you for approval.

(Sgd.) JOHN HOSKIN, *President.*

December 31st, 1890. WALTER BARWICK, *Treasurer.*

It was resolved that the members of the association are of opinion that the press of work in the Division Court in Toronto necessitates the immediate appointment of a third Judge, and the trustees are requested to forward a copy of their report and this resolution to the Attorney-General.

The following officers were elected for the year 1891: Mr. Moss, Q.C., President; Mr. Kingsmill, Q.C., Vice-President; Mr. W. Barwick, Treasurer; Mr. Armour, Q.C., Curator. Messrs. Bigelow, Q.C., Delamere, Q.C., A. MacMurchy, A. Cassels, and J. T. Small, Trustees. Messrs. Worrell, Q.C., and H. Cassels, Auditors. Mr. F. A. Drake, Secretary.

DIARY FOR FEBRUARY.

1. Sun.....*Sexagesima.* Sir Edw. Coke born, 1552.
2. Mon.....Hilary term commences. Criminal Assizes, Toronto. H.C.J., Q.B.D. and C.P.D. Sittings begin. County Court Non-Jury Sittings in York.
6. Fri.....W. H. Draper, 2nd C.J, of C.P., 1856.
8. Sun.....*Quinquagesima.*
9. Mon.....Union of Upper and Lower Canada, 1841.
10. Tues.....Canada ceded to Great Britain, 1763.
11. Wed.....Ash Wednesday. T. Robertson appointed to Chy. Div., 1887.
14. Sat.....Hilary Term and High Court of Justice Sittings end. Toronto University burned, 1890.
15. Sun.....*1st Sunday in Lent.*
17. Tues.....Supreme Court of Canada sits.
19. Thur.....Chancery Division High Court of Justice sits.
22. Sun.....*2nd Sunday in Lent,*
24. Tues,....St. Matthias.
27. Fri.. .....Sir John Colborne, Administrator, 1838.
28. Sat.....Indian Mutiny began, 1857.

Early Notes of Canadian Cases.

EXCHEQUER COURT OF CANADA.

BURBIDGE, J.] [Jan. 19.

THE QUEEN *v.* THOMAS.

Cancellation of a land patent—33 Vict., c. 3, s. 32, s-s. 4—38 Vict., c. 52, s. 1—Improvidence in granting patent—Indian gratuity, effect of half-breed sharing in.

T., a half-breed, was, on the 15th day of July, 1870, in actual peaceable possession of a lot of land in the Province of Manitoba, previously purchased by him, and of which he had been for some years in undisturbed occupancy. On the 3rd of August, 1871, he shared in the gratuity given to certain Chippewa and Swampy Cree Indians under a treaty then concluded with them, and in the years 1871, 1872, 1873, and 1874, he participated in the annuities payable thereunder. But before taking any monies under the treaty, he enquired of the Commissioner, who acted for Her Majesty in its negotiation, whether by accepting such money he would prejudice his rights to his private property, and was informed that he would not; and when in 1874 he learned for the first time that by reason of his sharing in such annuities he was liable to be accounted an Indian, and to lose his right as a half-breed, he returned the money paid to him in that year. Subsequently his status as a half-breed was recognized by the issue to him in 1876 of half-breed scrip.

Held, that under The Manitoba Act and amendments (33 Vict., c. 3, s. 32, s-s. 4, and 38 Vict., c. 52, s. 1) he was entitled to letters-patent for the lot mentioned.

Aikins, Q.C., and *Culver*, Q.C., for Crown.

Howell, Q.C., and *Cumberland*, for defendant.

BERTRAND *v.* THE QUEEN.

Damages to property from government railway —The government Railway Act, 1881, s. 27 —Claimant's acquiescence in construction of culverts, effect of—Negligence of Crown's servants—Estoppel.

The suppliant sought to recover damages for the flooding of a portion of his farm at Isle Verte, P.Q., resulting from the construction of certain works connected with the Intercolonial Railway. The Crown produced a release under the hand of the suppliant, given subsequent to the time of the expropriation of a portion of his farm for the right of way of a section of the Intercolonial Railway, whereby he accepted a certain sum "in full compensation and final settlement for deprivation of water, fence rails taken, damage by water, and all damages, past, present, and prospective, arising out of the construction of the Intercolonial Railway," and released the Crown "from all claims and demands whatever in connection therewith." It was also proved that although the works which caused the injury were executed subsequent to the date of this release, they were undertaken at the request of the suppliant and for his benefit, and not for the benefit of the railway, and that with respect to part of them, he was present when it was being constructed and actively interfered in such construction.

Held, that he was not entitled to compensation.

2. The Crown is not under an obligation to maintain drains or back-ditches constructed under 52 Vict., c. 13, s. 4.

Pouliot for claimants.

Hogg, Q.C., for the Crown.

BRADY *v.* THE QUEEN.

Petition of right—Demurrer—Personal injuries received on public work — Negligence of Crown's servants—Liability of Crown therefor.

Demurrer to petition of right.

Suppliant alleged in his petition that on a

certain date he was driving slowly along a road in the Rocky Mountain Park, N.W.T., when his buggy came in contact with a wire stretched across the road, whereby the suppliant was thrown from his buggy to the ground and sustained severe bodily injury. He further alleged that the Rocky Mountain Park was a public work of Canada, under the control of the Minister of the Interior and the Governor-in-Council, who had appointed one S. superintendent thereof; that S. had notice of the obstruction to traffic caused by the wire and had negligently failed to remove it, contrary to his duty in that behalf; and that the Crown was liable in damages for the injuries so received by him. The Crown demurred to the petition on the ground that the claim and cause of action were founded in tort, and could not be maintained or enforced.

Held, that the petition disclosed a claim against the Crown arising out of an injury to the person on a public work resulting from the negligence of an officer or servant of the Crown while acting within the scope of his duties and employment, and therefore came within the meaning of 50-51 Vict., c. 16, s. 16 (c), which provides a remedy in such cases.

City of Quebec v. *The Queen*, *ante*, referred to.

Demurrer overruled with costs.

Hogg, Q.C., in support of demurrer.

Chrysler, Q.C., and *Lewis*, contra.

CITY OF QUEBEC *v.* THE QUEEN.

Petition of right—Demurrer—Injury to property resulting from negligence of Crown's servants on public work—Crown's liability therefor—50-51 Vict., c. 16, s. 16 (c.)—Interpretation.

Demurrer to a petition of right.

1. The grounds upon which the petition was founded are as follows: On the 19th of September, 1889, a large portion of rock fell from a part of the cliff alleged to be the property of the Crown, under the citadel at Quebec, blocking up a public thoroughfare in that city, known as Champlain street, to such an extent that communication was rendered impossible between the two ends thereof.

2. The suppliants charged in their petition that this accident was caused by the execution of works by the Crown which had the effect of breaking the flank side of the cliff, the daily firing of guns from the citadel, and the fact that no precautions were taken by the Crown to prevent the occurrence of such an accident. The Crown demurred to the petition on the ground, *inter alia*, that no action will lie to enforce a claim founded on the negligence, carelessness, or misconduct of the Crown or its servants or officers.

Held, there being no allegation in the petition that the property mentioned was a work of defence or other public work, or part of a public work, and it not appearing therein that any officer or servant of the Crown had any duty or employment in connection with the property mentioned, or that the acts complained of were committed by such officers while acting within the scope of their duties or employment, no case was shown by the suppliants in respect of which the court had jurisdiction under the Exchequer Court Act, 50-51 Vict., c. 16, s. 16(c).

3. Section 16 (c) of the said Act is substantially a re-enactment of R.S.C, c. 40, s. 11, and under it the Crown is liable in damages for any death or injury to property on any public work, when such death or injury arises either from the misfeasance or non-feasance of any servant or officer of the Crown while acting within the scope of his duties or employment.

4. The Crown's immunity from liability for personal negligence is in no way altered by section 16 (c) of said Act.

Demurrer allowed with costs, and leave granted to suppliants to amend petition of right.

Hogg, Q.C., in support of demurrer.

Belcourt, contra.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

From 1st Div. Ct., Wentworth.] [Dec. 31.

SAWYER *v.* THOMAS.

Bills of exchange and promissory notes—Cheque—Presentment—Notice of dishonor—Debtor and creditor—Payment.

Where a creditor accepts from his debtor the cheque of a third person, he must, without undue delay, present that cheque for payment, and if it is dishonored notify the defendant of the fact and claim recourse against him on the original

indebtedness. Unless this is done, the creditor must be taken to have accepted the cheque in payment of the debt, and the debtor is discharged.

Judgment of the First Division Court of Wentworth affirmed.

E. Martin, Q.C., for the appellants.

John Crerar, Q.C., for the respondents.

From STREET, J.] [Jan. 13.

HUNTINGDON *v.* ATTRILL.

Judgment—Foreign judgment—Penalty—Action to enforce.

The Courts of this Province will not indirectly enforce the penal laws of a foreign country by entertaining an action founded on a judgment obtained in that foreign country in a penal action.

The court being divided in opinion as to the penal nature of the judgment in question the appeal was dismissed, and the judgment of STREET, J., 17 O.R. 245, affirmed.

N. Kingsmill and *H. Symons* for the appellant.

McCarthy, Q.C., and *A. R. Creelman*, Q.C., for the respondent.

[Jan. 13.

BLACKLEY *v.* KENNEY (No. 2).

Surety—Extending time—Discharge—Notice of suretyship.

This was an appeal by the plaintiff from the judgment of ROBERTSON, J., reported 19 O.R. 169, and came on to be heard before this court HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A.) on the 29th of May, 1890.

Aylesworth, Q.C., and *W. Macdonald*, for the appellant.

A. C. Galt for the respondents.

The facts are fully stated in the report of the case below and in the reports of previous appeals to this court, 16 A.R. 272, and 16 A.R. 522.

The court allowed the appeal with costs upon the ground (not taken in the court below) that as there was no evidence whatever of the plaintiff's knowledge of the covenant under which the alleged suretyship arose, and as he had no reason to think that the relation of principal and surety existed, his dealings with the debtor did not work a release, assuming that that relationship did exist.

From STREET, J.] [Jan. 13.

GIBBONS *v.* MCDONALD.

Assignments and preferences—Bankruptcy and insolvency—R.S.O. (1887), c. 124, s. 2.

A security for a pre-existing debt, given when the debtor is in insolvent circumstances, cannot be impeached, though working a preference, if it has been taken in good faith and without knowledge of the insolvency.

Johnson v. *Hope*, 17 A.R. 10, and *Molsons Bank* v. *Halter*, 16 A.R. 323, and in the Supreme Court (not yet reported) considered.

Judgment of STREET, J., 19 O.R. 290, affirmed.

Moss, Q.C., and *Hayes*, for the appellant.

Lash, Q.C., and *Mabee*, for the respondent.

From Chy.D.] [Jan. 13.

SIBBALD *v.* GRAND TRUNK RAILWAY CO.

TREMAYNE *v.* GRAND TRUNK RAILWAY CO.

Railways—Level Crossings—Defect in construction—Trespassers — Negligence—Damages—New trial.

Where a railway company in constructing their railway cross an existing highway in a diagonal direction, leaving the road-bed of the line some feet below the level of the highway, they exceed their statutory powers, and are liable to indictment. They are therefore trespassers *ab initio* and chargeable with all injuries resulting even indirectly in consequence of the dangerous condition of the highway to those lawfully using it, and this liability attaches to a company operating the line who have not themselves been concerned in the original improper construction.

Rosenberger v. *Grand Trunk R. W. Co.*, 8 A.R. 482, 9 S.C.R. 311, considered.

Judgment of the Chancery Division, 19 O.R. 164, affirmed, BURTON, J.A., dissenting.

McCarthy, Q.C., and *W. Nesbitt*, for the appellants.

Shepley, Q.C., and *S. W. Burns*, for the respondents.

From County Court, York] [Jan. 13

RADFORD *v.* MACDONALD.

Evidence—Executor and administrator—Corroboration—R.S.O. (1887), c. 61, s. 10.

To enable an opposite or interested party to recover in an action against the estate of a

deceased person it is sufficient if his evidence is corroborated, *i.e.*, strengthened, by evidence which appreciably helps the judicial mind to believe one or more of the material statements or facts deposed to. It is not necessary that the case should be wholly proved by independent testimony.

Parker v. *Parker*, 32 C.P. 127, approved.

The production by the plaintiff, an architect claiming payment for his services in drawing plans and making estimates for the erection of a house, of a memorandum in the deceased's handwriting, showing the rooms and accommodation required and the suggested cost, held (BURTON, J.A., dissenting) sufficient corroboration of the plaintiff's evidence.

Judgment of the County Court of York affirmed.

George Bell for the appellant.

P. H. Drayton for the respondent.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

Div'l Ct.] [Dec. 31.

CARTER *v.* STONE.

Assignment for benefit of creditors—Priority over executions—Purchase money of land sold under mortgage judgment—R.S.O., c. 124 s. 9.

On April 8th, 1890, the plaintiff obtained a judgment for sale of lands by the court to realize the amount of his mortgage and a judgment against the owner of the equity of redemption. On 24th April, 1890, execution creditors of the owner of the equity were made parties in the Master's office. On the 17th May, 1890, the lands were sold. On 9th June, 1890, before the purchase money fell due and before any of the parties had established their claims to it, the owner of the equity of redemption made an assignment for the benefit of his creditors.

Held, that by R.S.O., c. 124, s. 9, the assignee was given precedence as to the purchase money over the executions; in other words, the purchase money passed to him discharged by the statute of any liability to satisfy the executions out of it.

E. T. Malone for the execution creditors.

James Reeve, Q.C., for the assignee.

Div'l Ct.] [Dec. 31.

IN RE FIELD *v.* RICE.

Prohibition — Division Court—Garnishee suit —Money handed by prisoner to constable— Question of fact.

The defendant was arrested, and when taken to the police station handed over the money in his possession to a constable. Creditors of the defendant sought to garnishee this money by Division Court suits. The judge in the Division Court found that the money was handed over voluntarily and held that it could be garnished.

Held, that the question whether the garnishee was indebted to the defendant was a question of fact within the jurisdiction of the inferior court, and that prohibition did not lie.

Du Vernet for the defendant.

S. A. Jones for the plaintiffs.

Chancery Division.

BOYD, C.] [Dec. 5.

SMITH *v.* BENTON.

Canada Temperance Act—Action for liquors sold for use in a county where the Canada Temperance Act was in force—Right to recover—Distinction between those sold before and after a successful vote for the repeal of the Act.

In an action for the price of certain liquors sold for use in a county where the Canada Temperance Act was in force,

Held, following *Pearce* v. *Brooks*, L.R. 1 Ex., at p. 217, that any person who contributes to the performance of an illegal act by supplying a thing with the knowledge that it is going to be used for that purpose cannot recover the price of the thing so supplied, and that the plaintiff could not recover. But

Held, also, that a distinction should be drawn between the liquors sold before the successful vote for the repeal of the Act and between the vote and the revocation of the Order-in-Council bringing the Act into force. The latter were in contemplation of the lawful traffic thereafter expected, and the inference from the facts should not be against the legality of the dealings at this point between the parties, and that the plaintiff was entitled to succeed as to them.

Charles Macdonald for the plaintiff.

N. Mills for the defendant.

BOYD, C.] [Dec. 22.

SCOTT ET AL *v.* SCOTT.

Life insurance—Benevolent society—Endorsement on policy—Devise by will inconsistent with endorsement—Who entitled—Trustee—Executors—R.S.O., c. 136, s. 5.

J.H.S. took out a policy of life insurance with the Order of Foresters, a benevolent society, conditioned to be paid "To the widow or orphans or personal representatives of the said brother (J.H.S.)," and endorsed and signed on it, "I hereby direct that the endowment benefit due at my death on this endowment certificate shall be paid to my daughter, L.A.S." Subsequently, by his will, he devised to his executors all the rest of his estate, "Including the proceeds of a life insurance policy in the Independent Order of Foresters for the sum of $3,000," on certain trusts. After his death the proceeds of the policy were claimed by his executors and by his widow, who had been appointed guardian to the infant daughter, L.A.S.

Held, that the policy was within the meaning of R.S.O., c. 136, s. 5. That the effect of the endorsement was to withdraw the money from the control of the insured, so that upon his death it did not "form part of his estate." That such money was, however, payable "under the policy," and he could appoint trustees to receive and invest it where the person entitled was an infant, and that such trustee should be distinguished from his executors.

Held, also, that as the testator had directed his executors to hold this and other moneys in trust with directions repugnant to the absolute right of the daughter (L.A.S.), it would lead to confusion to let this money be mingled with other estate moneys in the hands of the executors, and that they were not competent trustees within the meaning of the Act (s. 11); and that as the widow had been duly appointed guardian for the infant daughter, and had given security for the due performance of her duties and the proper application of the money, she should be entrusted with it rather than the executors, and that the will was invalid so far as it assumed to deal with the policy.

D. M. Christie for the petitioners.

W. M. Douglas for the respondent.

BOYD, C.] [Jan. 6.

BEATTY *v.* DAVIS.

Gaming rights—Navigable water.

Ownership of land or water (though not enclosed) gives to the proprietor, under the common law, the sole and exclusive right to fish, fowl, hunt, or shoot, within the precincts of that private property, subject to the game laws when pertinent. And this exclusive right is not diminished by the fact that the land may be covered by navigable water. The right of navigation, when it exists, is to be used so as not to unnecessarily disturb or interfere with the enjoyment of the subordinate private rights of fishing and shooting. The public can only use the water for *bona fide* purposes of navigation, but not so as to occupy the water for the purposes of fishing or fowling when the soil underneath is the private property of one who objects to such occupation.

McCarthy, Q.C., and *H. S. Osler*, for the plaintiff.

Patterson, Q.C., for the defendant.

Practice.

Court of Appeal.] [Jan. 13.

MCNAIR *v.* BOYD.

Costs—Order of judge as to, under Rule 1172—"Good cause"—Allowing appeal without costs.

The words of Rule 1172, "The Judge or court makes no order respecting the costs," do not confer any wholly discretionary power on the Judge, but must be read with Rule 1170, as to an order made "for good cause."

And where, in an action in a County Court for damages for bodily injuries sustained by the plaintiff through the alleged negligence of the defendant, the jury found for the plaintiff and assessed the damages at $30, and added that the defendant should pay "the Court expenses," and the Judge made an order that the defendant should have full County Court costs, and that the defendant should not have the set-off provided by Rule 1172, because, in his opinion, the injury done to the plaintiff was attended by circumstances of great aggravation, and the jury ought to have given larger damages,

Held, OSLER, J.A., dissenting, that these were not circumstances which constituted "good

cause" within the meaning of Rule 1170; for the very matters relied upon by the Judge as "good cause" had been passed upon adversely by the jury; and therefore the costs should follow the event under Rule 1172.

Becket v. *Stiles*, 5 Times L.R. 88, followed.

Per OSLER, J.A.: The English cases where the question is, whether the successful party shall be deprived of costs altogether or shall have less costs than would ordinarily follow the recovery, do not apply. The Judge has power under Rule 1172 to order for good cause that the plaintiff shall have his costs upon the scale of the court in which the action has been brought, and not upon that of the court which would have had jurisdiction to the amount of the damages actually awarded. In this case the plaintiff had reasonable ground for bringing her action in the higher court, and there was, therefore, good cause for making the order.

Under the circumstances of the case, the appeal was allowed without costs; but

Per BURTON, J.A.: The only reason for withholding costs from the successful appellant was that the case was the first one that had come before the court upon the new rule, about which there had been much difference of opinion.

J. B. Clarke, Q.C., for the appellant.

Wm. Kingston, Q.C., for the respondent.

BOYD, C.] [Jan. 13.

GILMOUR *v.* MAGEE.

Writ of summons– Renewal of—Leave to serve renewed writ—Rules 238, 442—Forms 92, 124— Grounds for renewal — Discretion— Jurisdiction of local judge.

A writ of summons cannot be renewed without a Judge's order, and to satisfy the terms of Rule 238 leave to serve the writ after the lapse of a year should also be obtained.

But where an order for renewal was obtained and the writ renewed pursuant thereto, and served without any order for leave to serve, it was dealt with under Rule 442 and the service confirmed. Inconsistency in Rule 238 and Forms Nos. 92 and 124 pointed out. Where the delay in serving the writ arose from the pendency of an appeal in an action between the same parties, the decision of which would affect the plaintiff's course, and service was not made till that appeal was decided,

Held, that a local Judge's discretion in extending the time for service should not be interfered with.

A local Judge has jurisdiction under Rule 238.

St. Louis v. *O'Callaghan*, 13 P.R. 322, followed.

D. Armour for the plaintiff.

Middleton for the defendant.

BOYD, C.] [Jan. 14.

FLETT *v.* WAY.

Order— Power of Judge or Master-in-Chambers to rescind—Ex parte order—Order made after notice upon default—Rule 536.

A Judge or the Master-in-Chambers has power to reconsider a matter which has been brought before him *ex parte*, on the application of an opposing party; and he can also open up a matter in respect of which an order has been made after notice and upon default to show cause, if he is satisfied that opposition was intended and that any injustice has arisen.

Semble, that if necessary the words "*ex parte* order" in Rule 536 may be read so as to cover cases going by default, where through some slip cause has not been shown.

Titus for the plaintiff.

J. M. Clark for the defendant.

Chy. Div'l Ct.] [Jan. 19.

DUFFY *v.* DONOVAN.

Security for costs—Plaintiff out of jurisdiction —Defendants possessed of plaintiff's funds— Joint trustees—Discretion of court—Appeal —Acquiescence—Waiver.

In cases where the defendants are possessed of funds belonging to the plaintiff, the discretion of the court will be exercised against hampering the plaintiff by ordering security for costs.

The plaintiff, who lived out of the jurisdiction and had lately attained his majority, sued the defendants for an account and payment of funds which he alleged they held as joint trustees for him, he having had no account. The receipt of trust funds by both defendants was proved, but one defendant put the blame of their not being forthcoming on the other, and swore that he had a good defence to the action, though he did not disclose it. The other defendant did not defend.

Held, not a case in which the plaintiff should be required to give security for costs.

Compliance with an order for security for costs by giving security under protest, and with notice to the opposite party that it was under protest, and proceeding in the action,

Held, not an acceptance of and acquiescence in the order which waived the right of appeal.

Foy, Q.C., for the plaintiff.

C. Millar for the defendant, Haldane.

ROSE, J.] [Jan. 28.

MAHONEY *v.* HORKINS.

Mortgage action—Appearance disputing amount claimed—Statement of claim not required—Præcipe judgment—Rule 718—Motion to Court for judgment—Rules 551 and 753.

In a mortgage action for payment, foreclosure, etc., the defendant entered an appearance in which she stated that she did not require the delivery of a statement of claim, and added, "Take notice that the defendant disputes the amount claimed by the plaintiff."

Held, that the record was then complete, and that a statement of claim was unnecessary and irregular.

Peel v. *White*, 11 P.R. 177, approved and followed.

Held, also, that the case was not within Rule 718, and the plaintiff could not obtain a judgment on præcipe.

Upon motion to the Court upon the record as contained in the writ of summons and the appearance, an order was made under Rules 551 and 753, directing a reference to take the mortgage account, and directing that if the referee should find any amount due to the plaintiff, the plaintiff should have judgment according to the writ with costs.

Douglas Armour for the plaintiff.

Masten for the defendant.

Chy. Div'l Ct.] [Feb. 3.

HEASLIP *v.* HEASLIP.

Costs—Taxation—Appeal to Master under Rule 854—Order upon appeal—Further appeal from order, to Judge—Appeal from certificate of taxing officer—"Costs between solicitor and client"—"Costs as between solicitor and client."

The decision of FERGUSON, J., 14 P.R. 21, affirmed.

C. Millar for the plaintiff.

A. Hoskin, Q.C., for the defendant.

MANITOBA.

KILLAM, J.] [Jan. 7.

GRANT *v.* HUNTER.

Trial of issue under Real Property Act—Insufficient evidence of identity of plaintiff's grantor.

At the trial of an issue as to whether the plaintiff acquired by conveyance from the patentee an estate in fee simple as against the defendants, the defendants' counsel, at the request of the counsel for the plaintiff, produced the letters patent by which, after reciting that "Bernard Vivier, son of Michael Vivier, in his lifetime, of the Parish of St. Francois Xavier and Baie St. Paul, in the Province of Manitoba," had applied for the grant of the lands therein mentioned, and had been found entitled thereto, and that Bernard Vivier had since died intestate, leaving him surviving "Michael Vivier, of the said Parish of St. Francois Xavier and Baie St. Paul, his father, and sole heir-at-law," the lands were granted to Michael Vivier in fee simple.

The plaintiff produced a conveyance to her of the lands, purporting to be made by "Michael Vivier, of Edmonton, in the Northwest Territories of Canada, father and sole heir-at-law of Bernard Vivier, of the Parish of St. Francois Xavier, in the Province of Manitoba, deceased." This deed was executed by a marksman, the name being written as "Michel Vivier." At the trial a witness to this deed was called and deposed that he went for Vivier and told him plaintiff's husband wanted him to sign a deed. Witness did not know Vivier, and had never seen him before; he stated that Vivier knew nothing of the matter, or even that he owned the land, and told him that he had not sold it. Another witness stated he had known Bernard Vivier, but did not know whether he was then alive or dead; he did not know his father, but stated he knew a Michael Vivier, who formerly lived in St Francois Xavier, but went to Edmonton in 1866. The defendants did not offer any evidence, but rested their case on the objection that there was not sufficient evidence of the identity of the plaintiff's grantor with the patentee.

Held, that the evidence was not sufficient to entitle plaintiff to recover. Plaintiff non-suited.

J. S. Ewart, Q.C., and *C. W. Bradshaw*, for plaintiffs.

H. M. Howell, Q.C., and *T. D. Cumberland*, for defendants.

KILLAM, J.]

WARD *v.* BRAUN.

Set-off of costs—Certificate to prevent.

Motion for certificate to prevent a set-off of costs. See Administration of Justice Act, 48 Vict., c. 17, s. 133, s-s. 2, as amended by 49 Vict., c. 25, s. 17, as to taxing costs in case an action of the proper competence of the County Court be brought in the Court of Queen's Bench.

Plaintiff sued in the Q.B. and recovered a verdict for $116.15.

Held, that the onus was upon the plaintiff to bring out in evidence any facts upon which the certificate might be based. Placing upon plaintiff's services nearly the full value claimed, and allowing credits admitted by him, the case was within the jurisdiction of the County Court. Certificate refused.

J. S. Ewart, Q.C., and *C. P. Wilson*, for plaintiff.

N. F. Hagel, Q.C., and *G. Davis*, for defendant.

TAYLOR, C.J.] Jan. 8.

WHITE *v.* THE MUNICIPALITY OF LOUISE.

By-law stopping up road allowance—Application to quash—Notice insufficient—Estoppel—Question of compensation.

W. applied under section 258 of the Municipal Institutions Act, 53 Vict., c. 51, Man., 1890, to quash a by-law passed by defendant municipality, stopping up an original road allowance and selling the same to an adjoining owner.

The notice given was not dated; it was to the effect that the Council at their next meeting, "on the first day of September next," intended to pass a by-law to close a portion of the original road allowance.

The by-law passed not only closed the road, but provided for selling same to an adjoining owner. Section 435 of the Municipal Institutions Act provides that "No Council shall pass a by-law . . . for selling any original allowance for road, until written or printed notices have been posted up," etc.

Held, that notice being given was a condition precedent to the right to pass the by-law. That applicant, by attending the meeting of the Council, and opposing the passing of the by-law, was not estopped from taking exception to the want of notice of the by-law actually passed.

That providing compensation is not a condition precedent to the passing of a by-law to close a road.

Section 440 of the Act provides, "No Council shall close up any public road . . . . whereby any person will be excluded from ingress or egress . . . . unless the Council, in addition to compensation, also provide some other convenient road," etc. The applicant had another means of access than the road closed up.

Under such circumstances, to hold that another road must be provided would be most unreasonable. It is only where a person would be, by the closing of the road, excluded from all ingress and egress to or from his land, that he can demand some other convenient road or way of access. If he had access otherwise than by the closed road, but not so convenient, it is a case for compensation.

By-law quashed, with costs.

F. C. Wade and *A. Whealler* for applicant.

J. Campbell, Q.C., for municipality.

KILLAM, J.] [Jan. 19.

RE STARK & STEPHENSON.

Trial of issue under Real Property Act—Assignment and conveyance from same grantor—Notice—Question of priorities.

On Nov. 16, 1889, McKay, who was entitled to a conveyance in fee simple from trustees of a town site, on payment of certain monies, executed an assignment of his interest to Stark and Isbister; they filed the assignment with the trustees on Nov. 20th, 1889, and received from the trustees a deed bearing date Nov. 20th, 1889, which was registered on Jan. 27th, 1890. On Nov. 20th, 1889, McKay executed a conveyance to Stephenson, which was registered on Nov. 21st, 1889.

On Stark and Isbister applying to bring the land under the Real Property Act, Stephenson entered a caveat, and an issue was directed to determine whether Stark and Isbister, the plaintiffs in the issue, acquired the interest of McKay in the land as against Stephenson, the defendant in the issue.

On the trial it was shown that defendant had some notice of the negotiations with plaintiffs prior to the execution of the transfer to them, and that there was some verbal arrangement for the transfer. Defendant forbore to make any enquiry of plaintiffs, but went to McKay

and asked him if he had given any written agreement to plaintiffs, and McKay told him that he had not done so.

Held, that there was not sufficient proof of actual notice to defendant of the assignment to plaintiffs to defeat his priority of registration. By the execution of the first assignment, as between McKay and the plaintiffs, the latter became entitled to his interest in the contract with the trustees, and to acquire the land from them. As between them and the defendant, the plaintiffs were the first assignees of the contract, and had become entitled to obtain the legal estate.

Except, then, for the effect of the Registry Act, the issue should be found for the plaintiffs. A second assignment, in proper form, if first registered without notice of the previous one, would take priority, even though the first assignee should have completed the purchase and acquired the legal estate.

There was not, on the deed, an affidavit of execution by the grantee.

Held, that, notwithstanding that, the deed was properly registered.

H. M. Howell, Q.C., for plaintiffs.

J. S. Ewart, Q.C., for defendant.

TAYLOR, C.J.] [Jan. 21.

JAMES *v.* BELL.

Injunction to restrain issue of tax sale deed—Costs—Sale rescinded by municipality.

The plaintiff, owner of land sold for taxes, filed a bill against the purchaser, and the mayor and secretary-treasurer of the town, to restrain the issue of a deed to the purchaser. The principal objection taken was that no by-law had ever been passed authorizing the sale. Before the motion for injunction came on for hearing, the sale was rescinded by the Council.

Held, that, as it was shown by plaintiff on his bill, that no by-law had been passed, the issuing of the deed could not prejudice the owner's right to set aside the sale, even after the deed had been issued.

Ryan *v.* Whelan, 6 Man.R., 565, followed.

The plaintiff was not justified in applying for the injunction against the mayor and treasurer, and they were entitled to their costs of the motion.

J. D. Cameron for plaintiff.

C. P. Wilson for defendants.

KILLAM, J.] [Jan 24.

SAWYER *v.* BASKERVILLE.

Sale of machinery—Possession resumed by vendors—Re-sale—Bill to enforce lien for balance due.

The plaintiffs agreed to sell, and defendants to buy, a threshing machine and outfit, the property not to pass until payment; terms to be part cash and part notes, plaintiffs to have a lien on defendants' farm for balance due. The machine was delivered, but defendants considered it did not work according to the warranty which they alleged was given them, and they returned the machine to plaintiffs' agent, refusing to make any payment or to sign the notes. The plaintiffs took the machine and re-sold it; they then filed a bill seeking to charge defendants with the difference, asking for an order for payment and that the balance due might be declared a charge on defendants' lands.

Bill dismissed without costs, and without prejudice to any action at law for breach of the contract. Decree to contain a declaration that plaintiffs had no charge on defendants' lands. Plaintiffs might bring an action at law for damages for refusing to accept and pay for the machinery, but not for the price, as such, they having sold the machinery.

In re-selling the machinery the plaintiffs must be taken to have elected to rescind the contract, and to rely upon their claim for damages.

J. A. M. Aikins, Q.C., and *W. H. Culver*, Q.C., for plaintiffs.

J. S. Ewart, Q.C., and *J. E. Porter*, for defendants.

TAYLOR, C.J.] [Jan. 26.

RE LAKE WINNIPEG TRANSPORTATION CO.

Petition to wind up company—Preliminary objections—Charter not ultra vires—Execution against company, "unsatisfied."

An execution creditor applied to wind up the company. The company did not appear, but several other creditors opposed the application. The petitioner took the objection, that on the application for the winding up order, only the company could be heard to oppose it; creditors could be heard on the appointment of a liquidator.

Held: Objection invalid. The fact that the petitioner was a subsequent execution creditor was no bar to his filing the petition.

The objection was taken that since the passing of The Winding-up Amendment Act, 1889, no order could be made for winding-up a company in Manitoba; as to such companies The Winding-up Act, R.S.C., c. 129, was, by reason of the third section of the Amendment Act, no longer in force.

Held, that the provisions of The Winding-up Amendment Act, 1889, which are not made applicable to proceedings under The Winding-up Act, do not, in consequence of section 3 of the amending Act, apply to cases in which a petition has been presented to wind up a company incorporated in Manitoba. As to such companies the court has only the powers conferred by The Winding-up Act, R.S.C., c. 129, and those given by the amending Act, expressly made applicable to proceedings under the former Act.

The objects of the company were "Lake and river transportation of passengers and goods within the Province of Manitoba, cutting of logs, manufacture of lumber, etc., catching and dealing in fish, trading and dealing in general merchandise." It was objected that the charter of the company dealt with navigation and shipping and inland fisheries, matters which were reserved for the Parliament of Canada, and that the company was not one which could be incorporated by the Lieutenant-Governor under Con. Stat. Man., c. 9, s. 226.

Held, that the purposes for which the company was formed were within provincial authority, and did not infringe upon matters reserved for the Parliament of Canada; and that the purposes for which the company was incorporated were within the definition "Trading Company" in The Winding-up Act, s. 2, s-s. (C).

The sheriff fixed the 3rd of January, 1891, for the sale under the execution in his hands; it was shown that the writ was unsatisfied on the 30th December, 1890.

By section 5, s-s. (H) of The Winding-up Act, a company is to be deemed insolvent "If it permits any execution issued against it . . . to remain unsatisfied until within four days of the time fixed by the sheriff for the sale."

Held, that the writ in question was one unsatisfied within four days of or before the day of sale, and that the company was insolvent. Order made to wind up the company.

T. G. Mathers for petitioners.

J. S. Hough and *W. F. McCreary* for consenting creditors.

J. W. E. Darby and *J. D. Cameron* for opposing creditors.

BAIN, J.] [Jan. 26.

MCKAY *v.* NANTON.

Real Property Act—Preliminary objections to petition—Misnomer—Address for service.

The caveatee, Nanton, having applied for a certificate of title, McKay filed a caveat and petition for the purpose of establishing his claim to the lands.

The objection was taken that in the caveat the name of the applicant was stated to be Augustus Meredith "Newton," the proper name of applicant being Augustus Meredith Nanton.

Held, that the caveat was not invalid on that account; the mistake was only an irregularity that did not affect the substantial justice of the proceeding.

Another objection was, that the petition did not show that the lands had not been registered under the Act.

Held, that as the petition alleged that the caveatee had applied to bring the land under the Act, and the petitioner had filed a caveat forbidding this, it would be assumed that the caveat was lodged before the registration of the certificate of title.

By the Real Property Act, 1889, s. 130, sub-sec. 8, it is provided that every caveat "shall state some address or place within the Province of Manitoba, at which notices and proceedings relating to such caveat may be served." Schedule "O" to the Act gives a form as follows: "I appoint . . . . as the place at which notices and proceedings thereto may be served." The caveat filed in this case was as follows: "I forbid the bringing of such lands under the operation of the Real Property Act, 1889, appoint A. N. M., Commissioner of Railways' Office, Winnipeg, my agent, on whom notices and proceedings thereto may be served."

Held, that "the Commissioner of Railways' Office, Winnipeg," was merely descriptive of the person named and could not be taken to be the place at which service might be made. The direction in the statute must be deemed to be imperative, and a party seeking the benefit of the statute must comply with it strictly.

The petition cannot be entertained, but the dismissal should be without prejudice to the caveator's right to apply to file another caveat.

C. P. Wilson for caveator.

J. H. Munson for caveatee.

BAIN, J.] [Jan. 29.

DOUGALL *v.* LEGGO.

Prohibition—Unsettled account—Right to abandon excess beyond amount within jurisdiction of County Court.

Application for writ of prohibition to County Judge.

By the County Court Act, 1887, s. 41, s-s. 2, the County Court has jurisdiction in "all personal actions for claims and demands of debt, account, etc., when the amount or balance payable does not exceed $250." By section 45, "no greater sum than $250 shall be recovered in any action for the balance of an unsettled account, nor shall any action for such balance be sustained when the unsettled account forming the subject matter to be investigated in the whole exceeds $400."

Plaintiff issued a writ of attachment against defendant, claiming $573 for rent of hack and repairs to same. At the trial plaintiff abandoned the excess over $250, and judgment was entered for that amount; an objection that the amount of the claim was beyond the jurisdiction of the court was overruled.

On an application for a writ of prohibition,

Held, that the account sued for was an unsettled one. Such an action, if commenced by an ordinary writ, could not be maintained But where the action was commenced, as in this case, by writ of attachment under section 164, it would be maintainable. By section 174, it is provided that "no plaintiff shall divide any cause of action . . . . but any plaintiff having a cause of action above the value of $250, for which an attachment might be issued if the same were not above the value of $250, may abandon the excess, and upon proving his case may recover to an amount not exceeding $250." This section is not affected by the restriction in section 45.

Rule *nisi* discharged with costs.

F. H. Phippen for plaintiff.

Ghent Davis and *R. L. Ashbaugh* for defendant.

Law Society of Upper Canada.

THE LAW SCHOOL, 1891.

LEGAL EDUCATION COMMITTEE.

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This notice is designed to afford necessary information to Students-at-Law and Articled Clerks, and those intending to become such, in regard to their course of study and examinations. They are, however, also recommended to read carefully in connection herewith the Rules of the Law Society which came into force June 25th, 1889, and September 21st, 1889, respectively, copies of which may be obtained from the Secretary of the Society, or from the Principal of the Law School.

Those Students-at-Law and Articled Clerks, who, under the Rules, are required to attend the Law School during all the three terms of the School Course, will pass all their examinations in the School, and are governed by the School Curriculum only. Those who are entirely exempt from attendance in the School will pass all their examinations under the existing Curriculum of The Law Society Examinations as heretofore. Those who are required to attend the School during one term or two terms only will pass the School Examination for such term or terms, and their other Examination or Examinations at the usual Law Society Examinations under the existing Curriculum.

Provision will be made for Law Society Examinations under the existing Curriculum as formerly for those students and clerks who are wholly or partially exempt from attendance in the Law School.

Each Curriculum is therefore published herein accompanied by those directions which appear to be most necessary for the guidance of the student.

CURRICULUM OF THE LAW SCHOOL, OSGOODE HALL, TORONTO.

Principal, W. A. REEVE, Q.C.

Lecturers: E. D. ARMOUR, Q.C.
A. H. MARSH, B.A., LL.B., Q.C.
R. E. KINGSFORD, M.A., LL.B.
P. H. DRAYTON.

The School is established by the Law Society of Upper Canada, under the provisions of rules passed by the Society with the assent of the Visitors.

Its purpose is to promote legal education by affording instruction in law and legal subjects to all Students entering the Law Society.

The course in the School is a three years' course. The term commences on the fourth Monday in September and closes on the first Monday in May; with a vacation commencing on the Saturday before Christmas and ending on the Saturday after New Year's Day.

Students before entering the School must have been admitted upon the books of the Law Society as Students-at-Law or Articled Clerks. The steps required to procure such admission are provided for by the rules of the Society, numbers 126 to 141 inclusive.

The School term, if duly attended by a Student-at-Law or Articled Clerk is allowed as part of the term of attendance in a Barrister's chambers or service under articles.

The Law School examinations at the close of the School term, which include the work of the first and second years of the School course respectively, constitute the First and Second Intermediate Examinations respectively, which by the rules of the Law Society, each student and articled clerk is required to pass during his course; and the School examination which includes the work of the third year of the School course, constitutes the examination for Call to the Bar, and admission as a Solicitor.

Honors, Scholarships, and Medals are awarded in connection with these examinations. Three Scholarships, one of $100, one of $60, and one of $40, are offered for competition in connection with each of the first and second year's examinations, and one gold medal, one silver medal, and one bronze medal in connection with the third year's examination, as provided by rules 196 to 205, both inclusive.

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1. All Students-at-Law and Articled Clerks attending in a Barrister's chambers or serving under articles elsewhere than in Toronto, and who were admitted prior to Hilary Term, 1889.

2. All graduates who on the 25th day of June, 1889, had entered upon the *second* year of their course as Students-at-Law or Articled Clerks.

3. All non-graduates who at that date had entered upon the *fourth* year of their course as Students-at-Law or Articled Clerks.

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Any Student-at-Law or Articled Clerk may attend any term in the School upon payment of the prescribed fees.

Students and clerks who are exempt, either in whole or in part, from attendance at The Law School, may elect to attend the School, and to pass the School examinations, in lieu of those under the existing Law Society Curriculum. Such election shall be in writing, and, after making it, the Student or Clerk will be bound to attend the lectures, and pass the School examination as if originally required by the rules to do so.

A Student or Clerk who is required to attend the School during one term only, will attend during that term which ends in the last year of his period of attendance in a Barrister's Chambers or Service under Articles, and will be entitled to present himself for his final examination at the close of such term in May, although his period of attendance in Chambers or Service under Articles may not have expired. In like manner those who are required to attend during two terms, or three terms, will attend during those terms which end in the last two, or the last three years respectively of their period of attendance, or Service, as the case may be.

Every Student-at-Law and Articled Clerk before being allowed to attend the School, must present to the Principal a certificate of the Secretary of the Law Society shewing that he has been duly admitted upon the books of the Society, and that he has paid the prescribed fee for the term.

The Course during each term embraces lectures, recitations, discussions, and other oral

methods of instruction, and the holding of moot courts under the supervision of the Principal and Lecturers.

During his attendance in the School, the Student is recommended and encouraged to devote the time not occupied in attendance upon lectures, recitations, discussions or moot courts, in the reading and study of the books and subjects prescribed for or dealt with in the course upon which he is in attendance. As far as practicable, Students will be provided with room and the use of books for this purpose.

The subjects and text-books for lectures and examinations are those set forth in the following Curriculum :

FIRST YEAR.

Contracts.

Smith on Contracts.
Anson on Contracts.

Real Property.

Williams on Real Property, Leith's edition.

Common Law.

Broom's Common Law.
Kerr's Student's Blackstone, books 1 and 3

Equity.

Snell's Principles of Equity.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

SECOND YEAR.

Criminal Law.

Kerr's Student's Blackstone, Book 4.
Harris's Principles of Criminal Law.

Real Property.

Kerr's Student's Blackstone, Book 2.
Leith & Smith's Blackstone.
Deane's Principles of Conveyancing.

Personal Property.

Williams on Personal Property.

Contracts and Torts.

Leake on Contracts.
Bigelow on Torts—English Edition.

Equity.

H. A. Smith's Principles of Equity.

Evidence.

Powell on Evidence.

Canadian Constitutional History and Law.

Bourinot's Manual of the Constitutional History of Canada. O'Sullivan's Government in Canada.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to the above subjects as shall be prescribed by the Principal.

THIRD YEAR.

Contracts.

Leake on Contracts.

Real Property.

Dart on Vendors and Purchasers.
Hawkins on Wills.
Armour on Titles.

Criminal Law.

Harris's Principles of Criminal Law.
Criminal Statutes of Canada.

Equity.

Lewin on Trusts.

Torts.

Pollock on Torts.
Smith on Negligence, 2nd edition

Evidence.

Best on Evidence.

Commercial Law.

Benjamin on Sales.
Smith's Mercantile Law.
Chalmers on Bills.

Private International Law.

Westlake's Private International Law.

Construction and Operation of Statutes.

Hardcastle's Construction and Effect of Statutory Law.

Canadian Constitutional Law.

British North America Act and cases thereunder.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

During the School term of 1890-91, the hours of lectures will be 9 a.m., 3.30 p.m., and 4.30 p. m., each lecture occupying one hour, and two lectures being delivered at each of the above hours.

Friday of each week will be devoted exclusively to Moot Courts. Two of these Courts will be held every Friday at 3.30 p.m., one for the Second year Students, and the other for the Third year Students. The First year Students will be required to attend, and may be allowed to take part in one or other of these Moot Courts.

Printed programmes showing the dates and hours of all the lectures throughout the term, will be furnished to the Students at the commencement of the term.

GENERAL PROVISIONS.

The term lecture where used alone is intended to include discussions, recitations by, and oral examinations of, students from day to day, which exercises are designed to be prominent features of the mode of instruction.

The statutes prescribed will be included in and dealt with by the lectures on those subjects which they affect respectively.

The Moot Courts will be presided over by the Principal or the Lecturer whose series of lectures is in progress at the time in the year for which the Moot Court is held. The case to be argued will be stated by the Principal or Lecturer who is to preside, and shall be upon the subject of his lectures then in progress, and two students on each side of the case will be appointed by him to argue it, of which notice will be given at least one week before the argument. The decision of the Chairman will be pronounced at the next Moot Court, if not given at the close of the argument.

At each lecture and Moot Court the roll will be called and the attendance of students noted, of which a record will be faithfully kept.

At the close of each term the Principal will certify to the Legal Education Committee the names of those students who appear by the record to have duly attended the lectures of that term. No student will be certified as having duly attended the lectures unless he has attended at least five-sixths of the aggregate number of lectures, and at least four-fifths of the number of lectures of each series during the term, and pertaining to his year. If any student who has failed to attend the required number of lectures satisfies the Principal that such failure has been due to illness or other good cause, the Principal will make a special report upon the matter to the Legal Education Committee. For the purpose of this provision the word "lectures" shall be taken to include Moot Courts.

Examinations will be held immediately after the close of the term upon the subjects and text books embraced in the Curriculum for that term.

The percentage of marks which must be obtained in order to pass any of such examinations is 55 per cent. of the aggregate number of marks obtainable, and 29 per cent. of the marks obtainable on each paper.

Examinations will also take place in the week commencing with the first Monday in September for students who were not entitled to present themselves for the earlier examination, or who having presented themselves thereat, failed in whole or in part.

Students whose attendance at lectures has been allowed as sufficient, and who have failed at the May examinations, may present themselves at the September examinations at their own option, either in all the subjects, or in those subjects only in which they failed to obtain 55 per cent. of the marks obtainable in such subjects. Students desiring to present themselves at the September examinations must give notice in writing to the Secretary of the Law Society, at least two weeks prior to the time fixed for such examinations, of their intention to present themselves, stating whether they intend to present themselves in all the subjects, or in those only in which they failed to obtain 55 per cent. of the marks obtainable, mentioning the names of such subjects.

Students are required to complete the course and pass the examination in the first term in which they are required to attend before being permitted to enter upon the course of the next term.

Upon passing all the examinations required of him in the School, a Student-at-Law or Articled Clerk having observed the requirements of the Society's Rules in other respects, becomes entitled to be called to the Bar or admitted to practise as a Solicitor without any further examination.

The fee for attendance for each Term of the Course is the sum of $10, payable in advance to the Secretary.

Further information can be obtained either personally or by mail from the Principal, whose office is at Osgoode Hall, Toronto, Ontario.

The Canada Law Journal.

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IN these days of literary piracy it is refreshing to find in the United States a paper taking to task the decision of a New York Judge for legitimizing the plundering of the work of foreign authors. *The (N.Y.) Nation* quotes a decision of a Judge (Wallace) of the Circuit Court, who held "that any American may take and sell for his own profit all that goes under the name of the ninth edition of the Encyclopædia Britannica, provided he does not use articles therein written by Americans," and then remarks, "we trust there is not one honest man or woman in this community who will read it without a blush of shame and indignation. It means that American jurisprudence sanctions and even protects the wholesale, deliberate, advertised theft of the fruits of another man's labor and capital, provided that other man be born under a foreign flag. It is, therefore, a decision which, without meaning any disrespect to the learned Judge who delivered it, ought never to have been heard from any tribunal but that of an Algerine Cadi in the old days of the Corsairs. It actually makes mockery of our religion and of our morality, and brings disgrace on our courts and legislature. Of course there are plenty of Gallios among us who think it injudicious to say these things lest the thieves should get angry and steal more than ever. But theft and brigandage were never yet suppressed by soft-sawder. They have been always put down by the anger of honest men and the shame and sorrow of religious men."

WE find from an English paper that in a case before the Recorder of Plymouth, on a complaint by a Mr. Treleaven, where four gangs of porters were employed to unload his colliers (one of these gangs consisting of non-union men), and the union decided that he should be requested to discharge the non-union men, and that if he should refuse, the union men should strike, three of the secretaries of the unions were deputed to make this decision known to Mr. Treleaven, who refused to comply with it, and the men struck accordingly, but quietly. The Recorder decided against the union men, as guilty of an offence against the law forbidding intimidation, and fined each of the secretaries £20. The Recorder's judgment is described as "an elaborate and careful piece of reasoning, which betrays no trace of prejudice, and is pervaded throughout by a judicial spirit," and contains the following passage:

"I am of opinion that a strike by the members of a trade union for the purpose of increasing their wages or altering the condition of their employment is lawful, unless accompanied by violence or intimidation . . . . but that a strike for the purpose of compelling employers not to employ other persons, or to alter

the terms of employment of such other persons, is illegal, and renders all persons engaged in it liable to proceedings under this section." (Section 7 of the Conspiracy and Protection of Property Act, 1875).

The working-men in the unions, in their war against those outside the unions, do not meet with the sympathy from the public which they do in their contests with their employers for shorter hours and better pay. The public almost instinctively make the same distinction between the two kinds of strikes as the Recorder. The decision is a most important one, and will doubtless be appealed from. It may be interesting to some of our readers to know that the Recorder is Mr. Bompas, Q.C., a brother of the respected Bishop of the Mackenzie River Diocese, and who is and has been for many years resident therein.

PRIORITIES UNDER REGISTRY ACT.

Some criticism has been recently offered in the pages of our contemporary, the *Canadian Law Times*, on the cases of *Brown* v. *McLean*, 18 Ont. 533, and *Abell* v. *Morrison*, 19 Ont. 669. The reasoning upon which these decisions are based is considered to be inconclusive, and it is suggested that it is inconsistent with the current of previous authorities.

It can, however, hardly be denied that the decisions in both these cases effectuated substantial justice. Even the critic we refer to does not venture to suggest that the contrary is the case; so that even if the reasons assigned for the judgments are in anywise defective, which we do not admit, still one would naturally desire to see the principle which they establish maintained, for the very plain and simple reason that the very object of all law, whether statutory or judicial, should be the effectuating of substantial justice; for whenever the construction of statutes or judicial decisions leads to an unjust conclusion or result, we feel that in that point the law has failed to answer the purpose for which it was intended.

In the construction of such acts as the Registry Act, we think the courts have been careful in the past to construe them so as to give full effect to their provisions for the protection of all persons entering into transactions relying upon the accuracy of the state of facts disclosed by the registry books; and the cases referred to will be found to be no infringement of this fundamental and salutary principle. But it is quite another matter to construe the Registry Act so as to make it the instrument of injustice, by giving a registered instrument thereunder a priority never contemplated when the instrument was registered, and which was never bargained for nor agreed to be given; and for which priority no valuable consideration has ever been paid; and which has the effect of doing an injustice to some other party. It is not to be wondered at, therefore, if the courts are astute to find reasons to prevent such a result.

Apart from, and in addition to, the reasons assigned by the courts for the decisions in *Brown* v. *McLean* and *Abell* v. *Morrison*, we venture to submit that there is a very plain and intelligible principle upon which those cases may be supported, and that is the well-known principle of resulting trusts.

In *Brown* v. *McLean*, the contest was between the plaintiff, who had advanced money to the owner of real estate to pay off existing mortgages thereon, and the defendant, an execution creditor of the mortgagor. The mortgages were paid off and discharged, and a new mortgage given to the plaintiff to secure the advance. Prior to the discharge of the mortgages, the defendant had placed his execution in the sheriff's hands against the lands of the mortgagor, and he claimed that by virtue of the discharge of the prior mortgages he had acquired priority over the plaintiff; and Street, J., as we think, very properly held that he had not. We must remember that an execution creditor's rights in his debtor's lands are strictly limited (apart from any question of fraudulent transfer) to the rights of the debtor himself in those lands. If his debtor is a mere trustee, the creditor cannot sell the trust estate to pay the debtor's private debt, even though the debtor appear to be the ostensible owner on the registry books. In short, apart from the operation of the Registry Act, an execution creditor cannot sell any other than the estate of his debtor which is exigible, having regard to the nature of the creditor's claim: (see *Freed* v. *Orr*, 6 Ont. App. 690). He has no legal or equitable right to be paid out of any other estate which happens to be vested in his debtor. Where the sale is, however, made of land which on the registry appears to be the property of the debtor, and the sale is carried out and the deed to the purchaser registered without notice of any unregistered equitable right, it is possible that the sheriff's vendee might be protected under s. 83 of the Registry Act against the claim of unregistered equitable owners, though we do not think the point has ever been actually determined. See, however, *VanWagner* v. *Findlay*, 14 Gr. 53.

But so far as the rights of the parties in *Brown* v. *McLean* were concerned, they were in no way complicated by the Registry Act. The simple question there was whether the debtor had an estate in the lands in question, free from the prior mortgages, which was liable to the defendant's execution. The principle on which *Hamilton Provident and Loan Society* v. *Gilchrist*, 6 Ont. 434, was decided, we think, clearly shows that he had not. A certificate of discharge of a mortgage, when registered under the Registry Act, operates as a reconveyance to the mortgagor. It has no other or wider effect. Assume that in *Brown* v. *McLean* a reconveyance had actually been made to the mortgagor without disclosing the plaintiff's equity, could it for a moment be successfully contended that the mortgagor could have held it, as against the plaintiff who had advanced the money? We think not. Equity would hold that there was a resulting trust for the latter, and that the mortgagor was his trustee of the estate reconveyed; therefore, by the discharge of the prior mortgages the execution debtor himself acquired no beneficial interest in the property free from those mortgages, and, therefore, the estate which became revested in him by the registration of the discharges, could not be exigible under executions against him.

In *Hamilton Provident and Loan Society* v. *Gilchrist*, no doubt the element of fraud existed; but as against competing execution creditors who were in no way affected by the fraud, it was held that the plaintiffs' equitable right to be regarded as the mortgagees of the land in question was sufficient to oust the right of the

execution creditors, notwithstanding that on the face of deeds the debtor appeared to be the ostensible owner of the property.

In *Russell* v. *Russell*, 28 Gr. 419, the plaintiff, claiming title under an unregistered deed, was held entitled to an injunction to restrain a sale, by an execution creditor of her husband, of the interest which her husband would have had in the land in question but for such deed; and on page 421 we find Spragge, C., expressly denying that an execution creditor stands upon the same footing as a purchaser for value without notice who has registered before a prior purchaser for value, founding his conclusion on this point on *Beavan* v. *Oxford*, 6 D.M. & G. 507, 517; and we believe this point has never been seriously questioned.

For the reasons we have given, therefore, in addition to those relied on by the learned Judge, we do not think there can be very much doubt that *Brown* v. *McLean* was well decided.

Abell v. *Morrison*, 19 Ont. 669, stands in a somewhat different position, but may, we think, be supported on similar grounds. In that case the plaintiff sold a machine to the husband of Margaret Morrison, and she gave him a lien on her land for the price, which lien was duly registered. At that time there were two prior mortgages on the property. The defendant bought the property of Margaret, and not actually knowing of the plaintiff's lien, paid off the prior mortgages out of the purchase money and had certificates of their discharge registered. The plaintiff claimed that the result of this transaction was to give his lien priority over the defendant. The defendant claimed that he was entitled to stand in the place of the prior mortgagees for the amount he had paid them; and the court so held. It is apparent that the plaintiff did not acquire or contract for his lien on the faith of the property being free from the prior mortgages; but on the contrary, with full notice of there being subsisting charges. His position is in no wise damnified or made, by the judgment of the court, any worse than that which he actually contracted for.

Apart from the Registry Act, is there any ground for saying that the plaintiff's equity is not as the court has declared it? This point appears too plain to need any argument.

Margaret Morrison could not have set up the reconveyance from the mortgagees to her as against the defendant; she was merely his trustee of the estate so reconveyed. Though appearing on the registry books to be grantee, she was not really beneficially entitled to the estate reconveyed. The whole question, therefore, turns on the point that the reconveyance was so made as not to disclose the defendant's interest—but the plaintiff was in no wise prejudiced by the omission. Is there anything in the Registry Act which makes the disclosure of his interest imperative in the circumstances of the case, or which renders the omission fatal to his equitable right? A careful consideration of the Act will, we believe, show that there is nothing. Section 76, it will be observed, makes void unregistered conveyances as against "subsequent" purchasers or mortgagees. How can it be said that Abell was a subsequent mortgagee or purchaser to the defendant? He had already bargained for and obtained his lien before the defendant's equity accrued, and, therefore, that section cannot help him. And the reason of the

wording of the Act appears to be perfectly obvious, viz., that its object is to protect persons acquiring interests on the faith of the facts as disclosed on the registry books. If after the defendant had procured the discharge of the mortgages, and while the absolute title appeared to be vested in Margaret, the plaintiff had contracted for his lien, then he would have been a "subsequent" purchaser and the section would have applied; but having obtained his lien before the mortgages were discharged, and not having in any way contracted, or altered his position, on the faith that they were discharged, we venture to think it is impossible for him to claim the benefit of section 76. Neither does section 82 help the plaintiff; that section says: "Priority of registration shall prevail unless before the prior registration there has been actual notice of the prior instrument by the party claiming under the prior registration." The defendant's claim was based on the prior mortgages, which, as he claimed, though discharged in form were nevertheless still subsisting in equity, and of course the plaintiff was not in a position to deny notice of them; besides they were registered prior to his own lien and, under this section, if not effectually discharged in equity as encumbrances, this section assisted the defendant and not the plaintiff. The words of section 83 may at first sight appear somewhat more difficult to reconcile with the view we are contending for. The material point of it is as follows: "No equitable lien, charge, or interest affecting land shall be deemed valid in any court in this province as against a registered instrument executed by the same party, his heirs or assigns," etc. It may be asked, who is "the same party" referred to in this section? We think the answer must be the party creating the equitable lien, etc. If so, in the case in point Margaret is not the person who created the defendant's equity, but the mortgagees, who by their discharge reconveyed the property to her, and therefore it appears to us this section does not assist the plaintiff. We do not think that there are any other sections in the Registry Act material to the discussion, and apart from the Registry Act, as we have said before, the defendant's equity is hardly capable of controversy.

COMMENTS ON CURRENT ENGLISH DECISIONS.

The Law Reports for February comprise (1891) 1 Q.B., pp. 141-318; (1891) 1 P., pp. 9-128; (1891) 1 Ch., pp. 65-201.

CRIMINAL LAW—EXTRADITION—OFFENCE OF A POLITICAL CHARACTER—EXTRADITION ACT, 1870 (33 & 34 VICT., C. 52), S. 3 (1)—JURISDICTION TO REVIEW DECISION OF MAGISTRATE.

In re Castioni, (1891), 1 Q.B. 149, is a decision of a Divisional Court (Denman, Hawkins, and Stephen, JJ.) on a motion for a *habeas corpus*, in order to review the decision of a magistrate committing a prisoner for extradition. The question was, whether the offence with which the prisoner was charged was an offence of "a political character." It appeared that a number of citizens of one of the Swiss Cantons, being dissatisfied with the government, rose against the government, took possession of the arsenal, and provided themselves with arms; attacked and broke open the municipal palace, seized the members of the government, and established a provisional government. On entering the municipal

palace, the prisoner, who was armed with a revolver, shot and killed a member of the government. The prisoner escaped to England. The insurrection having been suppressed by the Federal Government, the application was made by that government for the extradition of the prisoner on the charge of murder. The Extradition Act, 1870 (33 & 34 Vict., c. 52), s. 3 (1), provides that "a fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character." The magistrate committed the prisoner for extradition, on the ground that the offence was not of a political character. The prisoner then moved for a *habeas corpus*. The Divisional Court was unanimously of opinion that the true meaning of the expression "of a political character" was correctly stated in Stephen's History of the Criminal Law, Vol. ii. p. 17, and that the offence in question was incidental to and formed part of a political disturbance, and therefore was an offence "of a political character," and the prisoner was consequently ordered to be discharged from custody. The Court also ruled that the decision of the magistrate, that the offence was not "of a political character," might properly be reviewed by the Court on a motion for *habeas corpus*.

PRINCIPAL AND AGENT—BRIBE PAID TO AGENT BY PERSON CONTRACTING WITH PRINCIPAL—REMEDY OF PRINCIPAL AGAINST AGENT AND THIRD PARTY.

The Mayor of Salford v. *Lever* (1891), 1 Q.B. 168, is an appeal from the decision of the Divisional Court, 25 Q.B.D. 363, noted *ante* vol. xxvi., p. 483. It will be remembered that the action was brought against the defendants to recover from them the amount of certain bribes which they had paid to the plaintiffs' agent to induce him to enter into contracts on behalf of his principals for the supply of goods to them, and the amount of which bribes were fraudulently added to the price charged to the plaintiffs for the goods. Similar frauds had been practised by other parties against the plaintiffs in connivance with the agent. On the discovery of the frauds, the plaintiffs entered into an agreement with the agent to assist them by giving the necessary information and evidence to enable them to bring actions against the contractors (including the defendant) for the recovery of damages sustained by the plaintiffs, and the agent guaranteed that the damages recovered in such actions would amount to a specified sum, and by way of securing the guaranty the agent deposited in a bank securities to the value of the sum guaranteed; and it was agreed that any sums recovered in the actions should be accepted by the plaintiffs in part satisfaction of the agent's guaranty, and that upon the receipt of the full amount guaranteed the securities deposited should be returned to the agent, and he should get a complete discharge. This arrangement was carried out by the agent; and the defendant contended that the wrong complained of was a joint tort, and that the agreement between the plaintiffs and the agent operated as a discharge of the agent, one of the joint tortfeasors, and that consequently the defendant was also discharged. The Divisional Court held that the defendant was not discharged, and the Court of Appeal (Lord Esher, M.R., and Lindley and Lopes, L.JJ.) now affirm that decision. Lord Esher, M.R., points out that the effect of the agreement or

understanding with the agent was not to release him but merely to suspend the right of action against him, and at any rate was not binding on the plaintiff corporation because it was not under seal, and was besides *ultra vires*. All the members of the Court were of opinion that the cause of action of the plaintiffs against the agent and the defendant respectively were distinct and not dependent on each other, and that the plaintiffs had a right to recover from one the bribe he had received, and from the other the increased price, and that the recovery in one action would be no defence to the other.

INFANT—CUSTODY OF ILLEGITIMATE INFANT—PRACTICE—APPEAL FROM DECISION OF DIVISIONAL COURT ON APPLICATION AS TO CUSTODY OF INFANT—HABEAS CORPUS.

The Queen v. *Barnardo (Jones'* case) (1891), 1 Q.B. 194, is a case in which the mother of an illegitimate child of ten years old claimed the right to remove it from the care of Dr. Barnardo, the well-known philanthropist, in order to place the child in a Roman Catholic institution. The child had been placed with the doctor with the mother's consent, and had been an inmate of one of his institutions for eighteen months when, instigated by some zealous Roman Catholics, she desired that the child should be removed from the defendant's custody and placed with Roman Catholics. The application was made to a Divisional Court on behalf of the mother for a *habeas corpus* to bring up the body of the infant. The application was strenuously resisted by the defendant, principally on the ground that the mother was a person of bad character and not fit to have the custody of the child herself, and therefore not fit, as the defendant contended, to have any voice in saying whether any other person should have the custody of it. The Divisional Court (Lord Coleridge, C.J., and Mathew, J.) granted the application, and appointed a guardian for the child, nominated by the mother, holding that in the case of an illegitimate child the Court will in a proper case give the same effect to the mother's wishes in respect of the care, maintenance and education of the child, as it gives to the wishes of a father of a legitimate child in these respects. The Court of Appeal (Lord Esher, M.R., Lindley and Lopes, L.JJ.), though not agreeing with the strictures made on the defendant's conduct in the court below, affirmed the decision; and in doing so, decided that an appeal would lie to the Court of Appeal from such an order, and that the recent decision of the House of Lords in *Cox* v. *Hakes*, 15 App. Cas. 506, did not apply.

PRACTICE—GARNISHEE ORDER—AFFIDAVIT ON INFORMATION AND BELIEF—ALLEGATION AS TO DEBT DUE BY GARNISHEE—INQUIRY AS TO OTHER DEBTS—ORD. XIV., R. 1 (ONT. RULE 935).

In *De Pass* v. *The Capital and Industries Corporation* (1891), 1 Q.B. 216, the Court of Appeal (Lord Esher, M.R., Lopes and Kay, L.JJ.) came to a conclusion on a point of practice which is at variance with cases in our courts (see Robinson & Joseph's Digest, pp. 273-4), viz., that on an application to attach a debt an affidavit on information and belief that a specific debt is due from the garnishee is sufficient to found the application; the Court also decided that it is not an answer to the application based on such an affidavit for the garnishee merely to deny that the specific debt is due, but that he may be required to depose that

he does not owe any debt to the judgment debtor, and on his refusal to do so an order absolute may rightly be made. The order of the Divisional Court (Day and Lawrence, JJ.), setting aside the attaching order made by a Master, was therefore reversed.

PRACTICE—COUNTER-CLAIM—JUDGMENT ON COUNTER-CLAIM, MOTION FOR—ORD XXVII., R. 11 (ONT. RULE 727).

Jones v. *Macaulay* (1891), 1 Q.B. 221, settles a point of practice which is not very clear upon the Rules. The question being, where to a counter-claim for a debt, no defence is pleaded by the plaintiff, how is the defendant to obtain judgment on the counter-claim? The defendant claimed the right to sign judgment as of course for the amount claimed, but the Court of Appeal (Lord Esher, M.R., Lopes and Kay, L.JJ.), adopting the practice followed in *Higgins* v. *Scott*, 21 Q.B.D. 10, held that the only way a judgment can be obtained by a defendant on a counter-claim, or default of defence, is by motion for a judgment. Lopes, L.J., comments on the inconvenience and injustice which might result if a defendant could sign judgment as of course and issue execution against the plaintiff before the latter's claim against him had been disposed of.

PRINCIPAL AND SURETY—DISCHARGE OF SURETY BY GIVING TIME TO PRINCIPAL—SUBSEQUENT COVENANT BY PRINCIPAL TO PAY DEBT AT A LATER TIME.

In *Bolton* v. *Buckenham* (1891), 1 Q.B. 278, the defendant, who was a surety, claimed to have been discharged from liability by reason of time having been given to his principal by a subsequent agreement, to which he was no party. The circumstances of the case were as follows: The defendant was surety for the payment by a mortgagor of a mortgage debt of £450 on 4th March, 1858, under a covenant made September 4th, 1857. By a deed made December 15th, 1884, this mortgage, which was made to one Cooper, was assigned to the plaintiff, together with various other mortgages on other properties, and together with the benefit of all covenants therein contained, he advancing £3,200 to take them up; and the mortgagor executed a new mortgage to him, subject to a proviso for redemption on repayment of (the amount advanced) £3,200 and interest thereon, on January 19th, 1885, and which sum the mortgagor covenanted to pay. Day, J., who tried the action, held that the effect of the transaction was to give time to the mortgagor, and therefore the surety was discharged; and he doubted whether the assignment of the benefit of all covenants applied to the surety's covenant for payment, and thought it was confined to "collateral covenants," *e.g.*, for further assurance, etc. The Court of Appeal (Lord Esher, M.R., and Lopes and Kay, L.JJ.), without discussing the latter question, affirmed the decision of Day, J., on the ground that the taking of the mortgagor's covenant in December, 1884, necessarily involved by implication that the lender of the money was not to sue for it before the day named in the covenant for payment; and it made no difference that the benefit of the first mortgage was expressly reserved by the second, because the right to sue under the first mortgage was inconsistent with the implied undertaking not to sue contained in the second.

SHIP—BILL OF LADING—INCORPORATION OF CONDITIONS OF CHARTER PARTY INTO BILL OF LADING.

In *Serraino* v. *Campbell* (1891), 1 Q.B. 283, the Court of Appeal (Lord Esher, M.R., Lopes and Kay. L.JJ.) affirmed the decision of Huddleston, B. (25 Q.B.D. 501), which we noted *ante* vol. xxvi., p. 583, the question, it may be remembered, being whether, where a bill of lading contained the words, "they (the consignees) paying freight for the said goods, *and all other conditions as per charter*," these latter words in italics had the effect of incorporating a clause in the charter party exempting the ship-owners from liability for loss occasioned by the stranding of the ship through the negligence of the master or crew, which was contained in the charter-party. The Court of Appeal were agreed that the words incorporated only those stipulations in the charter-party which were to be performed by the receiver of the goods, and did not include conditions which would exempt the charterer from liability for negligence. As Kay, L.J., puts it, the expression was equivalent to "they paying freight, and performing or observing all other conditions."

PRACTICE—SERVICE OF WRIT—ACTION AGAINST FOREIGN FIRM—SERVICE ON PERSON TEMPORARILY WITHIN THE JURISDICTION "AS PARTNER"—ORD. IX., R 6 (ONT. RULE 265).

Western National Bank of New York v. *Perez* (1891), 1 Q.B. 304, shows that the procedure prescribed by the Rules for the service of writs on defendants sued by the name of a firm is not in as clear or satisfactory a condition as it ought to be. We have had two or three judicial attempts to elucidate the Rules on this point lately, but the difficulty and confusion seem to become "worse confounded." In the present case the writ was issued against a firm which carried on business abroad, and all the members of the defendant firm were domiciled and resident abroad. The writ was served on a person not named in the writ, who was temporarily in England, whom the plaintiffs alleged to be a partner, and who was expressly served "as partner." He entered a conditional appearance, which was struck out as irregular. He then entered an unconditional appearance, and moved to set aside the service on the ground that he was not a partner of the defendant firm. A Divisional Court (Pollock, B., and Day, J.) refused to set aside the service. On the case coming before the Court of Appeal (Lord Esher, M.R., and Lindley and Bowen, L.JJ.) that Court had some difficulty in deciding what ought be done. Lord Esher thought that the service on the appellant was good service on the firm; but Lindley and Bowen, L.JJ., were of opinion that, on the authority of *Russell* v. *Cambefort*, 23 Q.B.D. 526 (see *ante* vol. 26, p. 8), the defendant firm, being a foreign firm, the service was not good; but that if the appellant had been individually named in the writ, the service on him would have been good, and that the omission to name him in the writ was an irregularity which the defendant had waived by entering an appearance. The order they made, therefore, was that if the plaintiffs amended the writ by naming the appellant and the other members of the firm individually as defendants, the service was to stand as good service on the appellant (not on the firm); but if they neglected to amend as stated, then the service was set aside with costs. Lindley and Bowen, L.JJ., were of the opinion that the effect of *Russell* v. *Cambe-*

fort is to overrule *O'Neil* v. *Clason*, 46 L.J.Q.B. 191, and *Pollexfen* v. *Sibson*, 16 Q.B.D. 792; but Lord Esher, M.R., did not agree to that view. According to the majority of the Court, therefore, in the case of suing a foreign firm whose members are resident abroad, the proper course is not to sue them by the firm name, but to sue and serve the several individuals who compose the firm, and not attempt to apply to such a firm the Rules which enable one partner or a manager to be served on behalf of the firm.

The cases in this number of the Probate Division do not call for any notice. We may, however, observe that if any of our readers take any interest in the ritual disputes which have of late been rife in the Church of England, they will find 110 pages of this number devoted to the recent case of *Read* v. *The Bishop of Lincoln*, in which the careful and exhaustive judgment of the Archbishop of Canterbury at least shows the difficulties and perplexities in which the subject is involved.

Notes on Exchanges and Legal Scrap Book.

SAMUEL JOHNSON ON LAWYERS.—"Sir," said Dr. Johnson to Sir William Forbes, "a lawyer has no business with the justice or injustice of the cause which he undertakes, unless his client asks his opinion, and then he is bound to give it honestly; the justice or injustice of the cause is to be decided by the Judge. Consider, sir, what is the purpose of the courts of justice,—it is that every man may have his cause fairly tried by men appointed to try causes. A lawyer is not to tell what he knows to be a lie, he is not to produce what he knows to be a false deed; but he is not to usurp the province of the jury and of the Judge, and determine what shall be the effect of evidence, what shall be the result of legal argument. If, by a superiority of attention, of knowledge, of skill, and a better method of communication, a lawyer hath the advantage of his adversary, it is an advantage to which he is entitled. There must always be some advantage on one side or the other, and it is better that that advantage should be by talents than by chance."—*Boswell's Johnson.*

CHURCH BELLS.—The *Troy Times* is evidently sensitive about one of the pet industries of that lively village when it says: "An English court has just decided that the chime of bells in the village of Deptford must not be sounded, because the noise is offensive to the majority of the property-owners of the vicinity. The souls of property-holders who could object to the delightful melody of church chimes must indeed be devoid of poetical instinct. Could this circumstance be related of any but stolid Britons?" Now, if Britons were really stolid, they would not be annoyed by the ringing of chimes. But the ringing of bells has been frequently forbidden by the courts, not only in England, but in this country, as in Pennsylvania (*Harrison* v. *St. Mark's Church*, Philadelphia Common

Pleas, 15 Alb. L.J. 248), and in Massachusetts (*Davis* v. *Sawyer*, 133 Mass. 289; S.C., 43 Am. Rep. 519), and in Missouri (*Leete* v. *Pilgrim Congregational Church*, 14 Mo. App. 590). Even if the *Times'* presses were so noisy as to be a nuisance they might be restrained by injunction. We can hardly conceive a more annoying nuisance than to be aroused from slumber by church or factory bells at the hour of five a.m. Those "sweet bells" would always sound to us "jangled, out of tune, and harsh." We should prefer a "still alarm." But courts will generally regulate rather than forbid the ringing of bells. In a recent Canadian case the court prohibited whistling for cabs at a London boxing-club between midnight and seven a.m.—*Albany Law Journal.*

How to Apply for Shares.—A curious story is going the round of the press to the effect that a speculative agent of the name of B. made application for some shares in an exploration company floated not long ago. The form required the applicant to give his name, address, and "description." Mr. B., it seems, took this instruction very seriously, and being of a naturally suspicious disposition, and chary of seeking the advice of others, this is what the astonished directors found on his application form immediately following the space for name and address: "Description—height, 5 ft. 4½ in.; weight, 9st. 11lb.; complexion fair, hair light; features small and sharp; thin beard, short, no moustache; teeth sound, with one exception in front; marks, none in particular; married, second time; family, three children by first wife, no issue by second; age thirty-six; occupation, none at present, lately in Government service, expect position in P——— when railway opens. Any other particulars please apply Rev.———. P.S.—Forgot to say have been out here seventeen years, understand the native character, and cattle, as Rev. Mr. ——— will bear out." This very literal gentleman handed in a draft for full amount of shares applied for.—*The Law Journal.*

Innkeepers and Guests.—What constitutes the relationship between innkeeper and guest? The reported cases which throw light on this point are so few in number as to give some value to the decision of the Court of Appeal last week in *Medawar* v. *The Grand Hotel Company*, in which this question was discussed. *York* v. *Grindstone*, 1 Salk. 388; 2 Ld. Raym. 388, *sub nom. Yorke* v. *Greenhaugh*, was a replevin of a horse, which the plaintiff, a traveller, had left at the defendant's inn, and which the defendant had detained for its keep. In this case Chief Justice Holt doubted whether the plaintiff was a guest, because he never went into the inn himself, but only left his horse there, which the innkeeper was not obliged to receive, and, if he did, did so as a livery stable keeper. Three other judges, however, held that the plaintiff was a guest by leaving his horse as much as if he had stayed himself, "because the horse must be fed, by which the innkeeper has gain; otherwise, if he had left a trunk or a dead thing." In *Bennett* v. *Mellor*, 5 T.R. 273, in 1793, an action for the value of goods stolen

from an inn, the plaintiff's servant had taken the goods in question to market, and not being able to dispose of them went with them to the defendant's inn, and asked the defendant's wife if he could leave the goods there until the next market-day. She refused, and the plaintiff's servant then sat down in the inn and had some liquor, putting the goods on the floor behind him. When he got up, after sitting there a little while, the goods were missing. A verdict was, on these facts, found for the plaintiff, and in reporting the case upon a motion for a new trial, Mr. Justice Buller observed that he was of opinion that, if the defendant's wife had accepted the charge of the goods upon the special request made to her, he should have considered her as a special bailee, and not answerable, having been guilty of no actual negligence; but that not being the case, he considered it to be the common case of goods brought into an inn by a guest and stolen from thence, in which case the innkeeper was liable to make good the loss in accordance with *Calye's Case*, 1 Sm. L.C. 8th edit. p. 140. This view was confirmed by the Court of King's Bench. In *Farnworth* v. *Packwood*, 1 Stark. 249; and *Burgess* v. *Clements*, 1 Stark. 251, where private rooms had been taken in an inn by travellers for the exposure and sale of goods, and it was held that a guest who takes exclusive possession of a room for such a purpose, and not *animo hospitandi*, discharges a landlord from his common law liability. In *Jones* v. *Tyler*, 3 Law J. Rep. K.B. 166; 1 A. & E. 522, an innkeeper was asked on a fair-day by a traveller driving a gig whether he had room for the horse, and he thereupon put the horse into his stable, received the traveller with some goods into the inn, and placed the gig in the street, whence it was stolen, and it was held that, as he had the benefit of the guest and provided provender for the horse, he was liable. In *Strauss* v. *The County Hotel and Wine Company*, 53 Law J. Rep. Q.B. 25, the plaintiff arrived at the defendants' hotel with the intention of spending the night there, and delivered his luggage to one of the hotel porters, but after reading a telegram decided not to spend the night there, and went into the coffee-room to order refreshments. Being unable to obtain what he required, he went to the station refreshment-room, which was under the same management as the hotel, and connected with it by a covered passage. Shortly afterwards he went out, telling the porter to lock up his luggage until the time for his train to start, and it was locked up in a room near the refreshment-room, but on his arrival on the platform a part of it was missing. In an action against the proprietors of the hotel, the plaintiff was non-suited upon the ground that there was no evidence that he ever became a guest of the defendants at their inn, and upon argument the non-suit was upheld, Lord Chief Justice Coleridge saying that he could find no ground for saying that the defendant was in any sense a guest within the defendants' inn at the time when his luggage was lost. In *Medawar* v. *The Grand Hotel Company*, the case recently before the Court of Appeal, the plaintiff went to the defendants' hotel early in the morning, having with him a portmanteau, hat-box, and dressing-bag. He was told that the hotel was full, but that there was a room engaged by persons who had not arrived which he could use for washing and dressing, and he was shown up, and his luggage was taken to this room. He there opened his dress-

ing-bag and took out a stand containing, amongst other things, a jewelry case, and having washed and dressed went down to breakfast, leaving the door of the room unlocked and the stand on the dressing-table. After breakfasting, he paid for his breakfast, went out, and did not return till late at night. On asking for his room he was told that he had none, and it appeared that the persons who had engaged the room had arrived, and that on their arrival one of the defendants' servants had removed the plaintiff's luggage into the corridor, leaving the stand, as it was, out of the dressing-bag. On the luggage being brought to a room which had been found for him, the plaintiff found that some of the jewelry was missing, and brought an action against the hotel company to recover its value. The action was tried before Mr. Justice Smith, without a jury, who held that, whatever the plaintiff's position was during the short period of time during which he was dressing and having breakfast, he was not a guest after he left in the morning, and on that ground and on the ground that the plaintiff had not shown any negligence on the part of the defendants which would make them liable as bailees gave judgment in their favor. This judgment has now been reversed by the Court of Appeal. The court were much pressed with the argument that the use of the room by the plaintiff for the purpose of dressing was under the terms of a special contract, but refused to entertain this proposition. In their opinion the proper inference from the facts, construed by the aid of ordinary knowledge of the world, was that the room was given to the plaintiff, subject to the notice that if the expected guests arrived he must quit it, and that he remained a guest until their arrival, and that the innkeeper continued to be the guardian of the guest's property until it was duly delivered to him. This being so, the court held that the hotel company must, in order to escape liability on their part to the extent of the £30, to which it is limited by 26 & 27 Vict., c. 41, show that the goods were lost by the plaintiff's negligence in leaving them open to view in an unlocked room, and that as they failed to prove this, since it was equally likely that the theft took place after the goods were, by the negligence of their own servants, placed in the corridor, the plaintiff was entitled to judgment for £30: *Cashill* v. *Wright*, 6 E. & B. 891, in 1856; *Morgan* v. *Raney*, 30 Law J. Rep. Exch. 131; *Oppenheim* v. *The White Lion Hotel Company*, 40 Law J. Rep. C.P. 231. As, however, the claim of the plaintiff exceeded £30, the court held that, as to the excess, the onus was by 26 & 27 Vict., c, 41, placed upon the plaintiff to prove, in order to entitle him to recover, that the loss occurred by the defendants' negligence, and as it was equally likely that the goods were stolen in the room in consequence of his own negligence, as in the corridor in consequence of the defendants' negligence, he had failed to discharge the burden of proof, and was not entitled to recover more than £30. A more thoroughly illustrative case of the law upon this point it would have been difficult to devise. —*The Law Journal.*

PERSONAL TRADE NAMES.—The law is well settled that every trader has a perfect right to use his own name when carrying on a business, provided that there are no circumstances of fraud attending such user. Of course, it cannot be

said that anybody can always use his own name as a description of goods which he sells, whatever may be the consequences of it, or whatever may be the motive of doing it. It is obvious, however, that there can be no dishonesty, even in the strictest sense, in a man using his own name for the purposes of his trade, or in stating that he is carrying on business exactly as he is carrying it on. At the same time, he must not employ any artifice to attract to himself the business of a rival trader of the same name, and he must not attempt to pass off his own goods as those of the other trader. To debar a man from trading honestly under his own name would be manifestly unjust. Indeed, it would lead to most serious consequences if people having acquired a business reputation with a name could prevent any man of the same name from carrying on the same business. But where a person sells goods under a particular name, and another person, not having that name, adopts it, the Court will presume that he does so in order to represent the goods sold by himself as the goods of the person whose name he uses. As was said by Lord Langdale in the leading case of *Croft* v. *Day*, 7 Beav. 84, 88; Tud. Merc. Law, 482: "No man has a right to sell his own goods as the goods of another . . . . no man has a right to dress himself in colors, or adopt and bear symbols, to which he has no peculiar or exclusive right, and thereby personate another person, for the purpose of inducing the public to suppose, either he is that other person, or that he is connected with and selling the manufacture of such other person, while he is really selling his own." The learned Judge went on to observe that the right which any person might have to the protection of the Court did not depend upon any exclusive right which he might be supposed to have to a particular name or to a particular form of words. "His right is to be protected against fraud, and fraud may be practised against him by means of a name, though the person practising it may have a perfect right to use that name, provided he does not accompany the use of it with such other circumstances as to effect a fraud upon others." It is a question of evidence in each case whether there is a false representation or not. However, according to the decision of the same learned Judge in *Clark* v. *Freeman*, 11 Beav. 112, unless a person would be damaged in his business by the adoption of his name by another person for any particular purpose, he has no ground of complaint. That case does not appear to have ever been overruled, but it came as a surprise to the profession, and can hardly be accepted as sound law. Nevertheless, on the authority of that decision, Mr. Justice Kay, in *Williams* v. *Hodge & Co.*, 84 L. T. 135, held that he could not grant an interlocutory injunction where the name of a medical man had been wrongfully coupled with a certain surgical instrument by the manufacturer thereof. His lordship expressed some doubt as to the correctness of Lord Langdale's decision, observing that, if the point before him had been a *res nova*, he would have decided differently. In *Re Riviere's Trade-mark*, 53 Law J. Rep. Chanc. 578; L. R. 26 Chanc. Div. 48, Lord Langdale's decision in *Clark* v. *Freeman* was severely criticised, Lord Selborne referring to it as a case that "had seldom been cited but to be disapproved." Another somewhat unsatisfactory case is that of *Hendriks* v. *Montagu*, 50 Law J. Rep. Chanc. 456; L. R. 17 Chanc. Div. 638.

From the judgment of the Court of Appeal in that case, it would seem to be sufficient to entitle the plaintiff to an injunction if, without any intention to deceive, the use of his name by the defendant is, in fact, calculated to deceive; and that this rule applies whether the name used is a mere fancy name or the defendant's own name, or the name which would be naturally used to describe his firm. The effect of that authority was, however, explained in the very recent case of *Turton* v. *Turton*, to which we shall presently refer.

The principles governing this branch of the law are, perhaps, best attainable from the well known case of *Burgess* v. *Burgess*, 22 Law J. Rep. Chanc. 675; 3 De G. M. & G. 896, where they are very clearly laid down. The "epigrammatic judgment," as it has frequently been termed, there given by Lord Justice Knight-Bruce is one that is always referred to in cases of this description, although the observations of Lord Justice Turner are generally regarded as furnishing a more accurate statement of the law. A somewhat similar authority is the decision of the Court of Appeal in *Massam* v. *Thorley's Cattle Food Company*, 46 Law J. Rep. Chanc. 707; L. R. 14 Chanc. Div. 748. The long line of decisions on this subject has been considerably added to during the past few years; and as illustrating how the well-established principles are applied, an examination of some of the more recent cases may not be without interest to our readers.

Taking the reported cases in their chronological order, *Franke* v. *Chappell*, 57 L. T. Rep. (N.S.) 141, decided by Mr. Justice Chitty in March, 1887, has first to be mentioned. There the plaintiff had originated a series of concerts, conducted by Dr. Richter, under the name of the "Richter Concerts." Mr. Justice Chitty refused to grant an injunction to restrain the defendant from using that name and advertising a series of "Richter Concerts," Dr. Richter having transferred his services to the defendant. The learned Judge was of opinion that it required a strong case to be made out to sustain a claim to the exclusive use of another person's name as a trade name; that no such case had been established in the present instance; and that there was no ground for saying that the term "Richter Concerts" had become dissociated from Dr. Richter himself, who was at liberty to carry his services to any market he chose.

Two further cases decided in 1887 were *The Marquis of Londonderry* v. *Russell*, 3 Times Rep. 360, and *Goodfellow* v. *Prince*, 56 Law J. Rep. Chanc. 545; L. R. 35 Chanc. Div. 360. *Bumsted* v. *The General Reversionary Company* (*Lim.*), 4 Times Rep. 621, which came before Mr. Justice Stirling, was another case where the plaintiffs failed to obtain relief. His Lordship refused to grant an interlocutory injunction to restrain the defendant company, whose registered office was in Liverpool, from carrying on business under the style of "The General Reversionary Company (Lim.)," the plaintiffs being the General Reversionary and Investment Company, carrying on business in London. The learned Judge observed that it was not sufficient to show that there was a similarity of names, but it must also be shown that there was a reasonable probability that the use of the name would result in the defendants appropriating a material part of the plaintiffs' business, as to which, upon the evidence, his lordship was not satisfied would be the case. But in *The Birmingham Vinegar*

Brewery Company v. *The Liverpool Vinegar Company and Holbrook*, Law J. N. C. 99, 1888; 4 Times Rep. 613; W. N. 1888, p. 139, an interlocutory injunction was granted by Mr. Justice North, his lordship being of opinion that what the defendants had done amounted to fraud. The defendant Holbrook had authorised the plaintiff company to sell sauces of their manufacture under his name, he being their traveller. On his being discharged from their employment he assigned to the defendant company the right to use his name in connection with sauces manufactured by them, and this Mr. Justice North held not to be a legitimate proceeding. The learned Judge considered that, even if Holbrook were selling his own goods under his own name, it would be his duty, under the circumstances, to take care that in so doing he was not passing off his goods as those of the plaintiff company, which had become well known and acquired a reputation in the market under Holbrook's name. So, in *Holt* v. *Smith*, 4 Times Rep. 329, Mr. Justice Kay also granted an interlocutory injunction.

The reported cases in 1889 were two in number, that of *Warner* v. *Warner*, 5 Times Rep. 327, 359, being the earlier. There the Court of Appeal agreed with Mr. Justice Stirling in thinking that an interlocutory injunction ought to be granted to restrain the defendant, whose name was Warner, from applying to a proprietary medicine which he had purchased, known as "Ashton's great gout and rheumatic cure," the name of "Warner's gout and rheumatic cure," which so closely resembled the preparations sold by the plaintiff Warner under the title "Warner's safe cures" as to be calculated to mislead the public. The defendant also sold medicines as "Warner's cures." The inference which the court drew from the evidence was that the defendant was not really honestly advertising his medicines under his own name, but was doing it in such a way as to acquire a portion of the reputation previously acquired by the plaintiff. The other case in 1889, *Turton* v. *Turton*, 58 Law J. Rep. Chanc. 677; L.R. 42 Chanc.Div. 128, is a most important one, mainly because of the clear and comprehensive judgments of the learned Judges of the Court of Appeal.

The plaintiffs in that case had for many years carried on business under the name of "Thomas Turton & Sons." The defendant, John Turton, had for many years carried on a similar business in the same town under the name, first of "John Turton," and afterwards of "John Turton & Co." He then took his sons into partnership and traded as "John Turton & Sons." There was no evidence of imitation of trade-marks, or attempts to deceive the public. It was held by the Court of Appeal, reversing the decision of Mr. Justice North, that, although the public might occasionally be misled by the similarity of names, the defendants could not be restrained from using the name of "John Turton & Sons," which was an accurate and strictly true description of their firm. Mr. Justice North had gone to the length of granting an injunction against the defendants, although his lordship was quite satisfied that they had acted honestly, and that, independently of the use of the name of their firm, which they had used in the honest belief that they were entitled to do so, they had made no attempt to pass off their goods as those of the plaintiffs. The learned Judge considered, however, that he was bound to come to the conclusion

which he did by the authority of *Hendriks* v. *Montagu*. He thought that that case showed that it was not necessary for the plaintiffs to prove fraudulent intention on the part of the defendants. Whether or not Mr. Justice North was right in his view of what was laid down in *Hendriks* v. *Montagu*, it was perfectly evident that his decision in *Turton* v. *Turton* could not be allowed to stand. The Court of Appeal did not regard *Hendriks* v. *Montagu* as rendering it incumbent upon Mr. Justice North to decide *Turton* v. *Turton* as he did. Lord Justice Cotton observed that Mr. Justice North had founded his decision on *Hendriks* v. *Montagu* "without considering what was the subject the learned Judges were dealing with in their judgment when they used the expressions on which he relied." Lord Justice Cotton then proceeded to explain the *ratio decidendi* in *Hendriks* v. *Montagu*.

Among the cases relating to trade names decided this year, perhaps the most important is *Tussaud* v. *Tussaud*, 59 Law J. Rep. Chanc. 631 ; L.R. 44 Chanc. Div. 678. There Mr. Justice Stirling granted an interlocutory injunction to the plaintiff company, Madame Tussaud & Sons (Lim.), proprietors of the famous waxworks exhibition, to restrain the registration of a proposed new company, under the name of "Louis Tussaud (Lim.)," which was promoted by Louis Tussaud, and of which he was to be manager, for the purpose of carrying on a similar business or exhibition. The defendant had never carried on such a business on his own account. "It could not be doubted," said Mr. Justice Stirling, "that the name of Tussaud was well known and of high reputation in connection with waxworks, and that if another exhibition of a similar nature to that of the plaintiff company were to be established in London in the defendant's name the one would 'in the ordinary course of human affairs be likely to be confounded with the other,'" quoting the words of Lord Justice James in *Hendriks* v. *Montagu* (*supra*). It followed, in Mr. Justice Stirling's opinion, from the decisions in the two cases of *Burgess* v. *Burgess* (*ubi sup.*) and *Turton* v. *Turton* (*ubi sup.*), that the defendant, Louis Tussaud, was at perfect liberty to open on his own account and to carry on in his own name an exhibition of waxworks. Further, he might take partners into his business, and carry it on under the name of Louis Tussaud & Co. The learned Judge, without actually deciding the point, also gave it as his opinion that the defendant, having commenced business on his own account, might sell it with the benefit of the goodwill to third parties, who might continue to carry it on under the same name, and transfer the business and goodwill to a joint-stock company registered under the same name as had previously been used in connection with the business. But his lordship conceived it to be clear that the defendant could not confer on another person the right to use the name of "Tussaud" in connection with a business which the defendant had never carried on, and in which the defendant had no interest whatever; and the learned Judge came to the conclusion that the defendant could not confer that right on a company in relation to which he would stand simply in the position of a paid servant.

The above expression of opinion by his lordship bore fruit in a further attempt by the defendant to make use of his name in connection with a wax-

works exhibition, he having entered into a partnership to carry on such an undertaking under the name of "Louis Tussaud's Exhibition." The plaintiff company again attempted to restrain him from so doing, but on this occasion without success, Mr. Justice Stirling holding that what they sought was practically a monopoly of the name of Tussaud in connection with waxworks to which they were not by law entitled.

The subsequent decision of Mr. Justice Kay in *Rendle* v. *J. Edgcumbe, Rendle & Co. (Lim.)*, 63 L.T. Rep. (N.S.) 94, fortifies the view taken by Mr. Justice Stirling in *Tussaud* v. *Tussaud*; for Mr. Justice Kay held that the defendant, who was not at the time carrying on a certain business, he having assigned all his interest therein to his creditors, had no right to lend his name to a company promoted by him, and of which he was manager, which name, from its being so like one already attached to an established business, would be calculated to deceive.

Sometimes the question raised is whether on the sale of a business carried on under a particular name the purchaser has a right to use that name. Thus, in *Thynne* v. *Shove*, 59 Law J. Rep.Chanc. 509, the plaintiff had sold to the defendant his business premises and the goodwill of the business carried on by him there. The deed by which the sale was effected contained no express assignment of the right to use the plaintiff's name. Mr. Justice Stirling held (distinguishing *Levy* v. *Walker*, 48 Law J. Rep.Chanc. 273; L.R. 10 Chanc. Div. 436) that the defendant had, by virtue of the assignment of the goodwill, the right to use the plaintiff's name in the business, so as to show that the business was the one formerly carried on by him, and not so as to expose him to any liability by holding him out as the owner of the business, or as one of the persons with whom contracts were to be made.

The last case to which we shall refer is that of *Lewis's* v. *Lewis*, 25 L.J. N.C. 111. The plaintiff, who carried on a large retail business in various provincial towns, widely advertised and known as "Lewis's," claimed an injunction to prevent the defendant, whose name was J. M. Lewis, from carrying on a similar business in Preston under the name of "Lewis's." Mr. Justice Kekewich did not consider that the defendant was using his own name of J. M. Lewis in a fair and honest way when he added to it an 's,' preceded by an apostrophe. The learned Judge was of opinion that the object of the defendant was to represent that his business was that of the plaintiff, and thereby to injure him; and accordingly granted a perpetual injunction.

Summing up briefly the results of the various decisions, the following propositions may, we think, be taken as a correct statement of the law relating to personal trade names, as it at present stands. A trader who adopts as his business name that which is an accurate statement of an existing state of facts—*e.g.*, his own name if trading alone, or his own in combination with those of his partners, or a comprehensive description of them—cannot, in the absence of fraud, be restrained from so doing.—*The Law Journal.*

Reviews and Notices of Books.

The County Court Manual, being a collection of the Statutes relating to the Practice, Procedure, and Jurisdiction of the County Courts of Nova Scotia, with notes, etc. By George Bingay, Q.C., of the Nova Scotia Bar. Toronto: Carswell & Co., 1891.

This compilation, while not as useful to us as a similar work on the law in our own Province would be, is still interesting as affording a comparison between the Procedure and Jurisdiction of this Court in each Province. A jury of five men only is required, and if after two hours absence these cannot agree, four of them may render averdict. An appeal lies to this Court from Justices and Magistrates. Ontario, New Brunswick, and English cases are referred to. The paper is fair, and the work, on the whole, well got up.

Correspondence.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—In a recent issue of THE CANADA LAW JOURNAL reference was made to a case reported in 42 Federal Reporter, in which it was held that a telephone company could not maintain a bill for an injunction against the operation of an electric railway to prevent damages caused by the escape of electricity from its rails.

It may be of interest to mention that in the late case of *City and Suburban Telegraph Association* v. *Cincinnati Inclined Plane Railway Co.*, 30 Central Law Journal, 218, the Superior Court of Cincinnati, in March, 1890, arrived at an opposite decision.

Yours, etc., S. G. WOOD.

DIARY FOR MARCH.

1. Sun.....*3rd Sunday in Lent.* St. David.
3. Tues.....General Sessions and County Court Sittings for trial in York.
5. Thur.....York changed to Toronto, 1834.
8. Sun.....*4th Sunday in Lent.*
9. Mon.....Civil Assizes at Toronto.
10. Tues.....Court of Appeal sits. Prince of Wales married, 1863.
13. Fri.....Lord Mansfield born, 1704.
15. Sun.....*5th Sunday in Lent.*
16. Mon.....Chancery Sittings H.C.J. at Toronto.
17. Tues.....St. Patrick's Day.
18. Wed.....Arch. McLean, 8th C.J. of Q.B., 1862. Sir John B. Robinson, C.J., Ct. of Appeal 1862.
19. Thur.....P. M. S. Vankoughnet, 2nd Chancellor of U. C., 1862.
22. Sun.....*6th Sunday in Lent.* Palm Sunday.
23. Mon.....Sir Geo. Arthur, Lieut.-Governor of Upper Canada, 1838.
26. Thur.....Bank of England incorporated, 1694.
27. Fri.....Good Friday.
28. Sat.....Canada ceded to France, 1632.
29. Sun.....*Easter Sunday.*
30. Mon.....Easter Monday. B.N.A. Act assented to, 1867. Lord Metcalfe, Gov.-General, 1843.
31. Tues.....Slave trade abolished by Britain, 1807.

Reports.

ONTARIO.

SECOND DIVISION COURT, COUNTY OF ONTARIO.

[Reported for THE CANADA LAW JOURNAL.]

SMITH ET AL. *v.* A. LAWRENCE AND J. LAWRENCE (Claimant).

R.S.O., c. 124, sec. 2—Fraudulent preference—Lease by a debtor to a creditor—Counsel fee in Division Courts—D. C. Act, secs. 197, 155, and 208.

Neither the leasing in good faith for a fair rent by a debtor to his creditor, nor the subsequent application of the indebtedness of the lessor in part payment of the rent, are transactions which can be impeached under R.S.O., c. 124, sec. 2.

An interpleader, when the sum or value of the goods in dispute is over $100, is a "contested case" within the meaning of sec. 208 of the D. C. Act, and the successful party may have a counsel fee taxed to him, even if sec. 155, s-s. 2, did not expressly extend sec. 208 to contestations of this nature.

[Whitby, January, 15th, 1891.

This was an issue under the 197th section of the D. C. Act, to try whether the monies paid into court by the various garnishees are applicable towards the payment of the various judgment creditors of Albert Lawrence, as against James Lawrence, who claims them under the circumstances set forth in the judgment.

Dow and *McGilvray* for the primary creditors.

D. Ormiston and *J. E. Farewell*, Q.C., for the claimant.

DARTNELL, JJ. The primary debtor, Albert Lawrence, and the claimant, James Lawrence, are brothers. The former is a farmer, a married man with a family, and the latter, a mechanic and a bachelor, living for some years past with the primary debtor, who appears to be of an improvident nature; whereas James is a thrifty, saving man, to whom his brother constantly applied for, and received, pecuniary assistance, repaying part, but always having a balance against him, which balance at the time hereafter mentioned amounted to about $178. Albert (an instance of his improvidence), during the Toronto Exhibition of 1889, and after the threshing season was half over, was induced to become the purchaser of a steam thresher. He had no knowledge or skill in running such a machine, and had to hire his brother James at $1.00 per day to run it for him. In August, 1890, he proposed the same arrangement, which James refused to accede to; whereupon, rather than let the machine lie idle, Albert proposed to lease it to James at a rental of $350, payable on the 1st of January, 1891, the latter undertaking to furnish all labor and do all repairs. The only witnesses examined were the two brothers. They both say that, when the lease was drawn, nothing was said about applying Albert's indebtedness to James upon the rent; but I have no doubt it was in their minds that, when it came to be settled for, such indebtedness would be so applied.

The monies garnished formed the earnings of the machine, except $40.00 thereof, which, at Albert's request, James previously turned in in payment of debts due by Albert to parties for whom James threshed, and the balance was paid by James to Albert, after satisfaction of his own claim, and this $40.00 and the balance was also, as Albert swears, applied in payment *pro tanto* of his debts.

The two transactions, viz., the lease itself, and the payment or arrangement in advance of the rent, are both impeached as fraudulent preferences under R.S.O., c. 124, s. 2.

I do not so consider. It seems to me that both transactions were *bonâ fide* and natural, and that no creditors have suffered. The rent is a fair and reasonable one. James has only earned about fifty cents per day for his own labor over and above the rent and cost of running the machine. It is true that Albert's indebtedness to him is cancelled, but that is

due to his own labor and risk; and if there is insufficient to pay the remaining creditors, they are in a better position than if the machine had been idle during the threshing season of 1890. Is a debtor to be precluded from renting his house to a creditor at a fair rental? or similarly a chattel, as in this instance? Surely not.

The settlement of the rent in October appears to have been also *bonâ fide* and without fraudulent intent. The whole went in payment of Albert's debts, and was not in payment or preference by a debtor to a creditor, but the contrary. Albert, to about the extent of $350.00, was a creditor, not a debtor; and in no ways could the anticipation of payment by his debtor to him (and which is the latter's privilege) be construed as coming within what is forbidden by the Act.

I think that section 3, construed in a broad and liberal spirit, protects both transactions; and that the claim of the intervener should prevail. To hold otherwise must be to assert that any mutual adjustment of cross accounts between two parties would be a fraudulent preference as against the creditors of either of them. I submit that no such construction can be put upon the statute. But if I am mistaken in this view, I am of opinion, by the long chain of cases culminating in *Molsons Bank* v. *Halter*, 16 A.R. 326 (affirmed by S.C.), and *Gibbons* v. *McDonald*, 19 O.R. 290 (affirmed in appeal), that James' claim must prevail against the execution creditors of Albert. It is not clear that Albert is insolvent, or unable to pay his debts in full. Whether he is or is not will depend upon the margin over incumbrances on sale of his realty. At all events, I cannot find, on the evidence, that he was so, with the knowledge of James.

And, further, I cannot find that there was any intent on the part of either, or both, to make a preference.

Under all the circumstances I find in the claimant's favor, with costs (including a $5.00 counsel fee), to be borne rateably by the execution creditors.

The amount in question, and in court, is considerably more than $100.00. It is a "contested case" and the claimant is a "successful party," within the meaning of section 208 of the D. C. Act, even if s-s. 2 of section 155 did not expressly extend section 208 to contestations of this nature.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE.

Chancery Division.

FULL COURT.] [Jan. 19.

WATEROUS ENGINE CO. *v.* PALMERSTON.

Municipal Corporation—Contract for purchase of fire engine—Necessity of by-law.

The defendants, pursuant to resolution, invited tenders from the plaintiffs for supply of a fire-engine, and subsequently contracted under seal for the purchase of a fire-engine from them, subject to certain tests, which were satisfactorily fulfilled; after which the defendants nevertheless refused to accept the engine, and the plaintiffs now brought this action to recover the price thereof.

Held, affirming the decision of Rose, J., that the action must be dismissed, for under the Municipal Act, R.S.O., 1887, c. 184, ss. 480 and 630, as amended by 52 Vict., c. 36, ss. 20 and 40, the power of municipal bodies to purchase fire-engines can only be exercised by by-law.

Wilkes for the motion.

Clarke contra.

Full Court.] [Jan. 19.

BOYD *v.* ROBINSON.

Bond of indemnity—Judgment - Damages.

Boyd and Robinson were in partnership, and Boyd retired. Robinson (who continued the business) and his wife, Mary Robinson, executed a bond in a penal sum of $6000, conditioned that "If the said Robinson shall from time to time, and at all times hereafter, well and truly save, defend, and keep harmless, and fully indemnify the said Boyd, his executors and administrators, from and against all loss, costs, charges, damages, and expenses, which the said Boyd may at any time hereafter bear, sustain, or suffer, or be put to for or by reason of the non-payment by the said Robinson of the liabilities of the said firm of Robinson & Boyd, when and as the same become due and pay-

able, it being the intention, and the said Boyd is hereby indemnified, or intended so to be, from all and every liability of every nature and kind soever of the said firm of Robinson & Boyd, then this obligation to be void, otherwise to be in full force and effect."

Judgments were recovered by creditors of the firm against both Boyd and Robinson, and Boyd now sued Mary Robinson to recover the amount required to pay those judgments, although he had not himself paid them.

Held, reversing the dicision of ARMOUR, C.J., that the plaintiff was entitled to have the amount of the judgments paid into court, and to the costs of the action.

Per BOYD, C.: The strict construction of such contracts to be found in some earlier cases, limiting to recovery for actual damage, is not now to be commended when the court can so mould its judgment as to secure the application of the proceeds of the judgment to the person ultimately entitled to receive them.

J. Macgregor for the plaintiff.

Shepley, Q.C., for the defendants.

Full Court.] [Feb. 3.

BARBER *v.* CLARK.

Mistake— Over-payment of legacy — Interest, when allowable.

This was an action brought to recover a balance alleged to be due and unpaid upon a certain legacy.

The legacy, $60,000, was to be paid to the executor of the will, for the plaintiff, by the devisee of certain real estate, upon which it was charged, in twenty equal semi-annual payments, commencing six months after the testator's death, and to bear interest at the rate of 6 per cent. payable semi-annually at the time of each of such payments on the amount of such payment, to be computed from the time of the decease.

It appeared that eighteen of such semi-annual payments of $3000 had been made, but interest had been paid half-yearly on the whole amount of principal money unpaid, instead of interest computed merely upon each $3000. This arose from common error and mistake.

The moneys were paid so as to separate principal and interest, and the interest payments were consumed by the plaintiff in living expenses, whereas the principal moneys were nvested by him from time to time.

Held, that all the payments made should be taken into account, and applied (without addition of interest) to the aggregate of the amounts properly due and payable under the terms of the will, and so it should be ascertained if there was any balance due to the plaintiff.

Kilmer for the plaintiff.

Macdonald, Q.C., for J. R. Barber.

Kappele for J. P. Clarke.

Practice.

ROBERTSON, J.] [Jan. 21.

IN RE PARSONS, JONES *v.* KELLAND.

Money in court—Payment out to administratrix—Infants.

The administratrix of a deceased party was allowed to take out of court a sum of $210, which was part of the personal estate of the deceased, notwithstanding that two infants were among the next of kin who would be entitled to share in the estate after payment of debts, etc.

Hanrahan v. *Hanrahan*, 19 O.R. 396, followed.

Swabey for the administratrix.

J. Hoskin, Q.C., for the infants.

MACMAHON, J.] [Jan. 31.

IN RE BUTTERFIELD, A SOLICITOR.

Solicitor and client—Delivery of bills of costs before termination of actions—Application for taxation—Time—Special circumstances—R.S.O., c. 147, s. 34.

The solicitor defended an action of ejectment and prosecuted three actions for malicious prosecution on behalf of the applicants. On the 18th October, 1889, before the termination of any of the actions, the solicitor delivered to the applicants his bills of costs in them all up to that time. On the 29th April, 1890, he delivered further bills of costs in all the actions, which had then been brought to an end.

Application for a reference of all the bills to taxation was made on the 20th November, 1890.

Held, that the application was in time; for the retainer existed until the litigation ended; and the applicants had a full year from the delivery of the bills last delivered to apply for the taxation of all the bills.

Held, also, that the "special circumstances" which, by s. 34 of R. S.O., c, 147, must exist to justify a reference to taxation after twelve months from delivery of the bills are not confined to cases of actual fraud or gross overcharge and pressure.

Re Norman, 16 Q.B.D., 673, followed.

Held, also, that bringing three separate actions which might all have been joined in one, and charging excessive counsel fees, were special circumstances to be regarded in ordering a taxation after twelve months.

J. B. O'Brian for the applicants.

Masten for the solicitor.

FERGUSON, J.] [Feb. 4.

STEWART *v.* WHITNEY.

Money in Court—Payment out to administrator—Infants.

Money in court belonging, at the time of her death, to an intestate, was paid out to her administrator, notwithstanding that infants might be, or might become entitled to it or a share of it.

Semble, if the money belonged specifically to infants, the disposition might be otherwise.

Stephen M. Jarvis for the administrator.

J. Hoskin, Q.C., for the infants.

BOYD, C.] [Feb. 10.

GAGE *v.* DOUGLAS.

Assignments and preferences—R.S.O., c. 124, s. 7—Action by creditors to set aside fraudulent transaction—Right to continue after assignment for benefit of creditors—Order continuing action for benefit of particular creditors.

An action begun by creditors of an insolvent to set aside a transaction in fraud of creditors, before an assignment by the insolvent for the benefit of creditors under R.S.O., c. 124, can be prosecuted by the creditors after an assignment has been made; for the assignment has not the effect under s. 7, s-s. 1, of transferring the existing cause of action to the assignee.

S. 7, s-s. 2, may be read so as to apply to pending litigation instituted by the assignee or into which he has been introduced; and an order was made under that enactment in an action begun by creditors before an assignment, in which the assignee was after the assignment added as a co-plaintiff, authorizing the original plaintiffs and other creditors to continue the action as constituted for their own benefit upon indemnity to the assignee.

W. Creelman for the plaintiffs.

E. B. Brown for the defendants.

MANITOBA.

COURT OF QUEEN'S BENCH.

BAIN, J.] [Jan. 31.

BANK OF MONTREAL *v.* POYNER.

Jurisdiction of County Judge—Defendant resident in another county—Acquiescence in jurisdiction—Prohibition.

Action on promissory note made by defendant at his residence in the county of Brandon. Action was brought in County Court of Selkirk. No evidence was given that any order had been made by a Judge, under section 48 of the County Court Act, authorizing the action to be brought in the County Court of Selkirk. Defendant filed a dispute note objecting to the jurisdiction of the court; at the time the action was commenced he did not reside or carry on business in the county of Selkirk. Defendant applied for writ of prohibition.

Held, that defendant was entitled to a writ of prohibition with costs.

Objection: that defendant had submitted to the jurisdiction overruled. Where a defendant takes express objection to the jurisdiction, and follows up his objection without delay by applying for prohibition, he cannot be said to have acquiesced in, or submitted to, the jurisdiction.

F. H. Phippen for plaintiff.

W. R. Mulock, Q.C., for defendant.

TAYLOR, C.J.
DUBUC, J.
BAIN, J. } [Feb. 2.

THE QUEEN *v.* STARKEY.

Conviction under Liquor License Act—Rule to quash discharged—Costs awarded to Justices.

Defendant was convicted for selling liquor illegally, under Liquor License Act, 1889, and after proceeding by certiorari, he took out a rule calling upon the Justices to show cause why the conviction should not be quashed. The rule was discharged, on the ground that

there was no recognizance as required by 53 Vict., c. 2, s. 40, and an order made granting costs to the Justices.

On appeal,

Held, that the Judge had, irrespective of any recognizance, and in the exercise of the general jurisdiction of the court, power to award costs. Appeal dismissed with costs.

W. R. Mulock, Q.C., for Justices.

R. Cassidy for defendant.

H. A. Maclean for Attorney-General.

RE BY-LAWS OF CITY OF WINNIPEG EX PARTE BARRETT.

Separate schools—Public Schools Act of Manitoba, 1890, intra vires.

Summons on behalf of Barrett, a ratepayer of the City of Winnipeg, taken out under The Municipal Act, 53 Vict., c. 51, s. 258, calling upon the city to show cause why two by-laws, 480 and 483, should not be quashed for illegality.

By-law 480 provided for levying a rate for Municipal and School purposes in the City of Winnipeg for the year 1890. The second by-law, 483, amended the first by showing the proportion assessed for school purposes.

The principal ground stated in the summons was, "That because by the said by-laws the amounts to be levied for school purposes for the Protestant and Catholic schools are united and one rate levied upon Protestants and Roman Catholics alike, for the whole sum."

Applicant contended that the Public Schools Act, 1890, was *ultra vires* of the Provincial Legislature of Manitoba; that the old law was still in force, and the amounts required for educational purposes should have been levied separately upon Protestant and Roman Catholic ratepayers.

The application was heard before Killam, J., who

Held, 1. That the Public Schools Act was not *ultra vires*.

2. That the Public Schools Act itself did not create a system of denominational schools, or assume to compel any class to support denominational schools other than their own.

3. That the Public Schools Act, if enacted at the outset of the union, would not have been *ultra vires* in establishing a new system of schools, and in authorizing taxation without establishing or providing for the support of Separate Schools for any class. It was competent for the Legislature to abolish the system of Separate Schools which it had established.

Summons dismissed with costs.

On appeal to the Full Court,

Appeal dismissed with costs, DUBUC, J., dissenting.

Ewart, Q.C., and *G. F. Brophy*, for applicant.

Hon. J. Martin, Atty.-Gen., and *J. S. Hough*, for the City of Winnipeg.

[This case has gone to the Supreme Court.—ED.]

The following Manitoba Cases are reprinted, by permission, from *The Western Law Times*.

BAIN, J.] [January 29.

LAIRD *v.* TRERICE.

Writ—Service out of the jurisdiction.

The plaintiff sued the defendant, a non-resident, upon a cause of action which arose out of the jurisdiction. No order allowing the service was obtained prior to the service of the writ, but the copy of writ was served in the usual way. After the service, the plaintiff applied to the referee for an order allowing the service and for leave to proceed. The referee held that the two orders must be separate and that the order allowing the service must be served upon the defendant before the order for leave to proceed could be obtained. The plaintiff then applied to a Judge in Chambers, who held:

1. That the service of a writ outside the jurisdiction has practically no effect at all until an order allowing the service has been obtained, and "I am quite satisfied that the proper practice is to obtain an order allowing the service of the writ before the writ is served and serve it with the writ." The amendment to the A.J.A., 1885, in 1886, (49 Vict., cap. 35, sec. 32, practically repeals sec. 18, C.L.P.A., 1852.

Application refused.

Patterson for applicant.

BAIN, J.] [Feb. 10.

FREEHOLD L. & S. CO. *v.* BRYSON, AND GAIT, ET AL, CLAIMANTS.

Interpleader—Defects in sheriff's affidavit—Waiver of—Plaintiff in issue—Possession.

Appeal to Judge in Chambers from interpleader order of the referee directing an issue

in which claimants were made plaintiffs. The claimants appealed from the order, on the ground that the summons and order were improperly granted, and that there was no basis or foundation for the order, because:

(1) The affidavit of the sheriff on which the interpleader summons was granted did not state (*a*) that the goods seized were the property of the defendants, or (*b*) that the sheriff believed them to be so, (*c*) or any facts which would warrant the seizure of them as defendant's goods.

(2) That the affidavit did not state that the sheriff was in possession of the goods at the time of making the application, or that the proceeds of any sale thereof were then in his hands.

(3) That the evidence before the referee showed that the claimants were in possession of the goods at the time of the seizure, and claimants should therefore have been made defendants in the issue, and not plaintiffs.

It was urged, in reply, that the claimants, by not raising the first two questions before the referee, had waived the right to take advantage of the same on appeal, as they were mere irregularities, and that as to the question as to who should be plaintiff in the issue, the referee had exercised his discretion, which would not be reviewed on appeal.

Counsel for claimants in reply: The defects complained of in the sheriff's affidavit are not mere irregularities or formal defects, but matters of substance going to the whole foundation of the sheriff's right to an interpleader under the statute and could not be waived, citing in this connection, *ex parte Coates*, 5 Ch.D., 779, followed by *ex parte Johnston*, 25 Ch.D., 114-116. As to what must be shown by the sheriff in his affidavit to entitle him to relief: *Archbold*, 1406; *Lush*, 777; *Parkinson's* C.P., 151; *Cababe*, 31; *Chitty's Forms*, 822; *Northcote* v. *Beauchamp*, M. & S., 158; *Cook* v. *Allen*, 2 Dow., 11; *Anderson* v. *Calloway*, 1 Cr. & M., 183; *Scott* v. *Lewis*, 2 Cr. M.R., 289; *Holton* v. *Guntrip*, 6 Dow., 131; *Crump* v. *Day*, 4 C.P., 760; *Day* v. *Carr*, 7 Ex., 882; *Wheeler* v. *Murphy*, 1 Prac., 366; *Ogden* v. *Craig*, 10 Prac., 378; *Merchants Bank* v. *Herson*, 10 Prac., 117; *Duncan* v. *Tees*, 11 Prac., 66 and 296, and others. As to plaintiffs in issue: *Merchants Bank* v. *Herson* and *Duncan* v. *Tees*, *supra; Dom. Sav. & I. Co.* v. *Kilroy*, 7 C.L.T., 87, and *Morris* v. *Martin*, 19 Ont., 564.

The fact of an issue having been decided by the referee constituted no waiver on the part of the claimants. It was an operation of law under the statute, consequent upon the sheriff's application. The claimants would not "abandon their claim," and as they decided to maintain their rights, the referee could only, in such case, direct an issue, which was a position forced on the claimants by the statute without any alternative.

Held, (1) That the sheriff's affidavit was clearly insufficient, but the objections thereto not having been taken before the referee, and the learned Judge being of the opinion that the objections did not go to the jurisdiction, but were merely questions of practice, they could not prevail on this appeal.

(2) The practice in this court is settled, that when goods have been seized in the possession of a claimant, he should be the defendant in an issue between him and an execution creditor; and as the only evidence on the point shows that *prima facie* the claimants were in possession when the goods were seized, the order of the referee should be varied by making the claimants the defendants in the issue.

Order accordingly.

The issue was settled according to that directed in *Duncan* v. *Tees*, 11 Prac., 296.

Nugent and *Archer Martin* for claimants.

Campbell, Q.C., and *Mathers*, for execution creditors.

Cumberland for sheriff.

[The claimants have appealed from so much of this order as discharges the summons in appeal to set aside the interpleader summons and order.—ED.]

TAYLOR, C.J.] [Feb. 14.

LONDON & CAN. L. & A. CO. *v.* MUNICIPALITY OF MORRIS.

Practice—Appeal to Supreme Court from order allowing final judgment.

Application by way of summons to Judge in Chambers for leave to appeal to Supreme Court from ruling of Full Court confirming order of KILLAM, J., allowing plaintiffs to sign final judgment under A.J. Act.

It was objected that an appeal would not lie as this was an order made in the exercise of judicial discretion, within the meaning of sec. 27, Sup. Court Act.

Urged, in reply, that this was a final judgment within the meaning of those words in *Bank of Minnesota* v. *Page*, 14 A.R. 347.

Held, that the order appealed from was a final judgment and so appealable to the Supreme Court, but the objection that the order was not appealable should properly have been made in the Supreme Court.

Objection was taken that the defendants, a municipality, could not be parties to the appeal bond, on the ground that this was beyond their powers under the Municipal Act.

Held, that a municipality having the ordinary rights of suitors, to sue and be sued, could properly join in a bond in a suit in which they were parties, as an incident to such rights. The bond should be allowed.

Order made allowing bond and appeal, costs to abide event of appeal.

Perdue for plaintiffs.

Crawford for defendants.

THE REFEREE.] [Feb. 16.

MERCHANTS BANK *v.* GALBRAITH.

Foreign judgment — Pleading — Striking out embarrassing pleas.

The plaintiff sued on a foreign judgment recovered in the Common Pleas in Ontario in 1881. The defended pleaded never indebted, payment, and the Statute of Limitations, as of six years. The plaintiff moved to strike out the pleas as embarrassing, claiming that never indebted and payment could not be so pleaded and the plea of the statute was improper, on the ground that the statute, if at all limited, is to twenty years.

Held, that the pleas of never indebted and payment were properly pleaded, and if so advised, the plaintiff could apply to plead and demur to the plea of the statute.

Summons discharged with costs.

C. H. Campbell for applicant.

Cumberland for defendant.

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Latest additions:

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Law Students' Department.

EXAMINATION BEFORE HILARY TERM: 1891.

CERTIFICATE OF FITNESS.

Taylor on Equity.

Examiner: A. W. AYTOUN-FINLAY.

1. A. pays to B., executor of an estate, the sum of $750, which he (A.) supposes to be an existing debt. B., in turn, pays this money away to creditors of the estate.

As a fact, A.'s. debt had already been paid.

What remedy, if any, have A. and B., or has either of them?

2. Two parties enter into a valid agreement for the sale by one and the purchase by the other of certain land, and the purchase money is paid.

At the time the bargain is made the land is no longer existent, having been destroyed by an inundation.

What is the position of each party respectively, and why?

3. Distinguish and discuss the meaning of the expressions—*suggestio falsi; suppressio veri.*

Illustrate your answer by examples.

4. Under what circumstances, if any, will a Court of Equity grant relief to a party who is

particeps criminis with the party against whom relief is asked?

5. An official bond is given for faithful performance of duties. Through negligent supervision of the conduct of the officer he is enabled to perpetrate serious frauds.

The sureties on the bond are called upon to make good his defalcations.

On the above statement, what is the liability of the sureties?

6. Will Courts of Equity ever decree specific performance of a contract to enter into a partnership? Give reasons for your answer.

7. A. agrees to sell B. the goodwill of A.'s long-established business, apart from the premises in which the business has been carried on. A. refuses to complete the agreement. To what extent, if any, can Courts of Equity grant relief?

8. What right of property in private letters does equity recognize, so as to permit of its interference to restrain their publication?

9. Under what circumstances, if any, may a party purchase the interest of another in a contract, or security, or other property, which is in litigation?

May a solicitor purchase *pendente lite* the subject matter of a suit?

10. What is meant by general average, and what is the governing principle upon which it is established?

Benjamin on Sales.

Examiner: A. W. AYTOUN-FINLAY.

NOTE—Answers to each half of this paper are to be handed in separately.

1. A. inspects a consignment of wine, consisting of thirty-five pipes, in the possession and the property of B.

A week later A. contracts with B. for the purchase of "twelve pipes of the wine I inspected;" and after the completion of the contract of sale, he (A.) sells twelve pipes of wine to C. and gives him a delivery order for that quantity upon B.

B. accepts this order by writing on its face.

Afterwards B. refuses to deliver the wine.

What are the rights of A., B., and C., respectively, and why?

2. A. agrees to furnish B. within one month after date of contract with twenty reapers, specifically described. He appropriates and tenders the required number, but B. rejects them as not conforming to the contract description.

Just before the expiration of the month, A. again appropriates and tenders twenty reapers which are in accordance with the contract description.

B. refuses to accept them. What is the legal position of each party, and why?

3. A. and B. enter into a contract perfectly lawful and valid in itself, but which is completed on a Sunday.

What effect, if any, would this fact have upon the contract in Ontario? Why?

4. A. contracts with B. to perform certain work; but on account of changed circumstances A. afterwards states to B. that he will be unable to carry out his agreement within the time allowed.

B. thereupon enters into another contract with C. to perform the same work. Then A. offers to go on with the work, but B. refuses to permit him to do so. A. enters an action against B.

What are the rights of the parties, and why?

5. Vendor agrees to forward goods to vendee living at a distance, and by direction of the latter, he ships the goods by certain railways. The goods are in a merchantable condition when so shipped, but are in a bad condition on arrival at vendee's place of residence.

What, if any, is the liability of the vendor, and why?

Hawkins on Wills.

Examiner: M. G. CAMERON.

1. What interpretation was put upon the words "die without issue" prior to the passing of the Wills Act, and what, if any, change was effected by that Act?

2. When is parol evidence admissible to explain a will?

3. A., the testator, at the time of making his will, owes B. $500, which is secured by bond. By his will he bequeaths to B. a legacy of $500 absolutely. Is there any presumption raised by law in such a case? If so, may it be rebutted by parol evidence? What effect will a direction by the testator in his will, that his debts and legacies be paid, have upon the presumption?

5. The will of A. contained the following pro-

vision: "To Richard Jones I give an annuity of $100 for his life, payable quarterly." And further on in the will, "I give to Richard Jones $100 a year for his life." Will the legatee be entitled to both legacies? Explain. Would it make any difference if one of the two gifts had been by will, and the other by codicil?

5. A. by his will appointed B. and C. his trustees, and directed them to lay out and invest the residue of his estate in the public funds, and to pay and apply the dividends and interest arising therefrom to D. and E. equally between them as tenants in common. D. brings an action to compel the trustees to make to him an absolute transfer of a moiety of the residue. Can he succeed? Explain.

Armour on Titles, Statute Law, and Pleading and Practice.

Examiner: M. G. CAMERON.

1. A., being the owner thereof, conveys a parcel of land to B. B. does not register his deed. A. subsequently conveys to C., who registers his deed, but at the time of registration is aware that B. is in possession of the land.

Will C.'s conveyance be postponed to that of B.'s? Explain.

2. Is a mortgagor entitled to insist upon the mortgagee permitting him to inspect and make copies of the title deeds in the custody of the latter? Has there been any recent change made in the law in this respect?

3. A. conveys a parcel of land to B., who gives back a mortgage for a portion of the purchase money. A. assigns the mortgage to C. There is an incumbrance upon the property which A. should have discharged, but has not. What, if any, are B.'s rights against A. and C.?

4. If A. conveys a certain parcel of land to B., and the heirs of his body by his wife Catherine, and Catherine dies, and B. marries again, what interest has his second wife in this land? Explain.

5. Enumerate the different ways by which a will may be proved upon the trial of an action?

6. When is a defendant entitled to a præcipe order for security for costs, and what directions should the order contain?

7. What must be proved by the applicant in order to procure an interpleader order?

8. Will the court upon the application of an infant by his guardian direct the sale of his estate? If so, what facts must be shown in order to obtain such a direction?

9. Within what time must an appeal to the Court of Appeal from (*a*) a judgment of the High Court, and (*b*) an interlocutory order, not being a decretal order, be brought to a hearing?

10. Enumerate the class of actions that must be tried by a jury unless the parties waive their right to such a trial?

Smith's Mercantile Law—Smith on Contracts.

Examiner: F. J. JOSEPH.

1. The rule is that an executed consideration must have arisen from a previous request by the person promising, in order that it may be sufficient to support the promise. Mention any cases in which the law will imply a previous request.

2. Mention any cases in which money paid on an illegal contract can be recovered back.

3. Can a contract entered into by a person in an intoxicated condition be enforced?

4. What is a warranty in a policy of insurance, and how does it differ from a representation?

5. A., a manager of an incorporated company, is instructed by the directors to misrepresent the financial condition of the company. A. holds a large amount of the stock of the company in his own right, and in order to sell it to B. falsely represents to B. that there will be a large bonus declared at the next annual meeting of the company. B. purchases the stock, the company declares no bonus, and consequently the stock becomes worthless. What are the rights of B.?

6. How may an agent forfeit his commission?

7. What is meant by noting a bill?

8. Within what time must an action be commenced in the following cases:

(*a*) For debt upon a bond.

(*b*) For rent upon an indenture of demise.

(*c*) On a promissory note payable on demand.

Supposing the person entitled to any such right of action resides out of Ontario?

9. A. owes B. several sums, some of which are barred by the statute. A. makes a payment to B., but insufficient to discharge his whole liability. What are the rights of A. and B. respectively as to the appropriation of the payment made by B. Supposing neither A.

nor B. appropriates the payment, how will the law apply the payment?

10. What is the liability of a husband married since 1st July, 1884,

(*a*) For debts of his wife contracted before marriage.

(*b*) For torts committed by his wife before marriage.

(*c*) For torts committed by his wife after marriage.

CALL.

Equity and Criminal Law.

Examiner: A. W. AYTOUN-FINLAY.

1. Can a mortgagee be compelled to produce the title deeds of the mortgaged estate?

Explain the position of the parties when inspection of the title deeds is desired.

2. A. and B. purchase an estate for which B. alone advances and pays the purchase money.

(*a*) To what extent, if any, has B. a lien or mortgage on the land, or what right has he?

(*b*) Subsequently to the purchase partition of the property is made. How does this effect B.'s recovery of the part purchase money?

3. A. agrees to deliver to B. 1,000 bushels of a particular kind of barley, to be harvested, at a future day, from a certain field. This specific crop of barley is a failure to a large extent.

What is the liability, if any, of A. to B. on his contract, and why?

4. A mortgagee is in possession of the mortgaged estate.

Certain adjacent coal mine owners trespass upon the mortgaged estate, and take coal therefrom.

The mortgagor requires the mortgagee to account for the value of the coal.

What, if any, is the mortgagee's liability, and why?

5. In consequence of the ignorance or negligence of a solicitor, employed by trustees to prepare a mortgage, a loss occurs.

Can the trustees be held liable? Give reasons for your answer.

6. In what cases will an action for libel lie without laying special damage?

7. In what cases may, and in what cases may not, a magistrate take bail?

8. A *private* individual holds certain persons lawfully in his custody.

They escape therefrom.

How far is he liable (*a*) where the escape is due to negligence on his part? (*b*) Where he has connived at it?

9. Define the *crime* of perjury at common law.

A. swears to a certain state of facts, which state of facts did not exist as he has stated.

What is the test as to whether he has or has not committed perjury?

10. What nuisances are indictable?

When will an indictable nuisance give rise to civil action also?

Best on Evidence.

Examiner: A. W. AYTOUN-FINLAY.

NOTE.—Answers to each half of this paper to be handed in separately.

1. Explain and illustrate the maxim *res ipsa in se dolum habet.*

2. What does Mr. Best give as the one general rule of evidence *in causa*, and what are the three chief applications of it?

3. Under what circumstances, if any, is a witness privileged to refuse answering a question, when the answer may subject him to a *civil* suit?

4. What are the rules governing the admissibility of (*a*) the first wife, (*b*) the second wife, as a witness in cases of bigamy, and why?

5. What is the rule as to admissibility of *character* evidence, and how far is it open to the other side to contradict such evidence?

Dart on Vendors and Purchasers.

Examiner: M. G. CAMERON

1. A. is employed by parol to purchase an estate for B., at a certain price. Can he bind his principal by his written agreement to buy it for a larger sum; and if not, has the seller any remedy against the agent?

2. Is a vendor bound to disclose to a purchaser a latent defect in the title if the estate be sold subject to all fault? Explain.

3. A. was employed by B. to find a purchaser at a certain price for a parcel of land, and by way of compensation he was to be paid a certain percentage if a sale were effected. A. found a purchaser, but B. refused to complete the sale. What are A.'s rights against B.? Explain.

4. What precautions should a purchaser take before entering into possession of property concerning which the title is in dispute? Give the reasons for your answer, and state why the purchaser should take such precautions?

5. If A. and B. agree to purchase an estate, each to advance an equal portion of the purchase money, and at the time fixed for completion, A., for the convenience of B., advances the entire amount, but the conveyance is taken in the name of B. What, if any, are A.'s rights? Will parol evidence be admissible to show the real facts?

Blackstone: Theobold on Wills, the Statute Law, and Pleading and Practice.

Examiner: M. G. CAMERON.

1. What amount of undue influence must be shown in order to vitiate a will, and explain the difference in respect of the burden of proof between the rules applicable in the case of gifts *inter vivos* and testamentary gifts?

2. If there is a gift by will to A.B., second son of C. D., and A. B. is the third son, will A. B. take? Explain.

3. A. owes B. $500. By his will B. makes a gift of this debt to A., his executors and administrators, and directs that securities held for the payment of the debt be handed over to him. What would be the result if A. dies during the lifetime of B.?

4. A. by will devises a personal annuity to B. and the heirs of his body. What interest will B. take? Explain.

5. Where there is no attestation clause in a will, when, if at all, will the presumption that it has been duly executed be raised?

6. A. is a legatee under the will of B., who died on the 1st day of January, 1890. A. applies to the proper officer on the 10th day of July, 1890, for an order for the administration of B.'s estate. Is he entitled to the order? If so, upon what material should his application be based? If he is not, explain why not.

7. In order to determine whether the answers of a judgment debtor are or are not satisfactory, what is the true test to be applied?

8. What is the practice to be observed by a party who is dissatisfied with the rulings of a taxing officer upon the taxation of a bill of costs, and is desirous of appealing therefrom?

9. Is a Judge at liberty, in all description of cases, to direct the jury to answer any questions stated to them by him? Explain.

10. A. brings an action against B. for breach of promise of marriage, and goes into the witness box and clearly proves the promise and the breach, and calls no other witnesses. The defendants calls no witnesses. Can the plaintiff recover? Explain.

Pollock on Contracts—Byles on Bills—Blackstone.

Examiner: F. J. JOSEPH.

1. Under what circumstances can a solicitor purchase the property of, or accept a gift from, his client?

2. A. sells land to B., and covenants that he will not allow any buildings to be erected on the adjoining land owned by him except residents of a certain description. A railway company, under the authority of the legislature, appropriates a portion of A.'s land, and erects a station thereon. What are B.'s rights against A.?

3. Can a covenant partly legal and partly illegal be enforced?

4. Under what circumstances is forbearance to sue a good consideration?

5. What is the effect of the following covenants by A.:

(*a*) Not to marry anyone but B.

(*b*) Not to revoke a will made in favor of B. How would these covenants be affected by A. marrying C.?

6. What is your opinion as to the legality of the following:

(*a*) A. is in possession of certain evidences respecting the title of B. to certain property. B. is ignorant that he has any title to the property. A. agrees to deliver them to B. if he, B., will give him a certain proportion of the property when he recovers it.

(*b*) A., a solicitor, tells B. he will not continue his suit against C. unless he gives him a security on the property in litigation for the costs already incurred.

(*c*) A., a solicitor, tells B. if he will employ him to bring a certain action against C., he will not charge him any costs.

(*d*) A. agrees with B., a common informer, to indemnify him against costs if he will sue C. for a penalty to which C. is liable for the breach of a penal statute.

7. What is the measure of damages on a dishonored bill?

8. What must a protest contain?

9. Who are deemed natural born subjects? Who are denizens?

10. For what length of time may the Parliament of Canada and the Legislature of Ontario be prorogued, and how are they dissolved?

Flotsam and Jetsam.

UPON one occasion, while arguing a case in the Supreme Court of Missouri, Mr. Hayden was interrupted by the presiding Judge, who asked, "Why is it, Mr. Hayden, that you spend so much time in arguing the weak points of your case to the exclusion of the more important ones?" "Because," replied Mr. Hayden, "I have found, in my long practice in this court, that the weak points win fully as often as the strong ones."

"I MUST and will have order in this court," sternly remarked a presiding magistrate; "I have disposed of three cases without hearing a word of the evidence."

BY what authority do architects call their patrons their "clients"? It is a foolish affectation of a standing which they do not possess. They might as well call them their parishioners or patients. By derivation as well as by custom the lawyer is the only man who can have a "client," except in the case of a great man and his dependents. We find no authority in the lexicons for the application of the word to any mere relation of business nor to any other profession than that of the law. The word indicates a following for reasons of trust, dependence and protection, as of advocacy. By-and-bye we shall have plumbers and livery-stable keepers and milliners talking about their "clients." —*Albany Law Journal.*

A LAWYER once asked a Quaker if he could tell the difference between "also" and "likewise." "Oh, yes," said the Quaker; "Erskine is a great lawyer; his talents are admitted by almost every one; you are a lawyer 'also,' but not 'likewise!'"—*Pump Court.*

A LAW recently passed in Denmark provides that all drunken persons shall be taken home in carriages at the expense of the dealer who sold the last glass.—*Ex.*

DURING the chancellorship of Lord Eldon, the following scene took place:—A counsel at the Chancery bar, by way of denying collusion suspected to exist between him and the counsel who represented the other party, having said, "My lord, I assure you there is no understanding between us," Lord Eldon observed, "I once heard a squire in the House of Commons say of himself and another squire, 'We have never through life had one idea between us'; but I tremble for the suitors when I am told that two eminent practitioners have no understanding between them."—*Pump Court.*

Bona fides legalis is a condition of mind to be inferred from facts and circumstances, and consists essentially of a genuine belief of right, based upon reasonable grounds and a colorable title, resulting in acts affecting matters of expediency or utility, in regard to which acts the actor is not constrained or restrained in a contrary or different line of duty by his obedential or conventional obligations.—*Edinburgh Law Magazine.*

IRVING BROWNE, in a recent article, speaks of a certain distinguished lawyer in Troy, who was frequently reluctant to accommodate a brother practitioner, and always laid it on his client; of whom another, who was smarting under the exercise of this calculating caution, once observed in court, that he was "a very obliging man, personally, but had the meanest lot of clients of any man at the bar."

A new exception to the rule, that money paid under a mistake of law cannot be recovered back, has been discovered. A group of anxious students, awaiting the arrival of the examiners, at Osgoode Hall, were endeavoring to refresh their minds on the subject, when one of the number enquired for the exception. A thoughtful silence followed for a moment, when one of them remarked nervously: "The only case of recovering money paid under a mistake of law with which I am likely to become acquainted will be the return of my fees by the Law Society after this examination."

A WELL-KNOWN tailor in this city makes an announcement concerning legal bags which begins: "Important to Students-at-Law, Barristers, Queen's Counsel, and Judges." No doubt this is the proper order of precedence in this democratic age.

A CERTAIN prominent member of the Junior Bar in Toronto was recently asked to preside temporarily over the Division Court, and it is stated that he accepted, without hesitation, what he considered an easy task. When the learned acting Judge, after one afternoon's session, found himself compelled to reserve a number of cases, on one of which he sat up for three nights, and had conferred with various Judges of the High Court about others, he threw up the job, and we understand that money would not now tempt him to resume the judicial position.

RULE TO SECURE UNIFORMITY OF PROCEDURE IN OFFICES OF HIGH COURT.

The Registrars of the several divisions of the High Court shall confer, as often as any two of them shall deem it expedient, and also whenever required by the president of any division of the said High Court, with the view to securing uniformity of practice and procedure in the several offices at Osgoode Hall of the said divisions; and all regulations made by a majority of them and approved by the president of the High Court and by any Judge of a divison other than that of which the president of the High Court for the time being is a member, or made by the said president of the High Court and by any other Judge, respecting such practice and procedure in the said offices, shall be observed and followed therein and by the officers and clerks thereof.

In accordance with the above Rule, the Registrars of the three divisions of the High Court of Justice have agreed to the following matters of practice for the purpose of securing uniformity of procedure in the offices of the court, and they have been approved:

1. All judgments to be given out after entry; all judgments to be entered in the office where the appearance is required to be entered.

2. All orders to be charged for as special, except such as are issued on præcipe, and the fees payable on such special orders to be as set out in the tariff, namely, twenty cents by statute and twenty cents a folio up to six folios and no more than six folios to be charged for, exclusive of charge for entering.

3. On giving out any papers to parties entitled thereto in pursuance of an order or otherwise, no search can be charged. Order and receipt to be charged as separate filings.

4. Certificates for registration to be issued on filing a proper præcipe and production of original or office copy of order, or judgment; no copy of order or judgment need be filed.

5. Copying ordered from any office, when the pressure of business in such office will not allow of such copying being done therein in sufficient time, is to be done in the office of the Clerk of the Records and Writs (see Order-in-Council dated 3rd April, 1884); all copying to be paid for in stamps at the rate of ten cents per folio.

6. All forms to be used in the offices of the Registrars and Clerk of Records and Writs to be furnished by the Clerk of the Process.

7. Affidavits filed on applications before judgment clerks in actions in Q.B. or C.P. Divisions to be forwarded by them to the officer in whose office the action is pending.

8. Rule 28 (*d*) is to be acted on as though the Registrar of the Chancery Division or the Assistant Registrar was named therein as well as the Clerk of Assize.

9. Amendments under Rules 424 and 444 to be made on filing præcipe only.

10. The Registrars of the High Court of Justice for Ontario, pursuant to Rule 450 of the Judicature Act for Ontario, hereby prescribe that all rolls (judgments) and records written or printed (either by typewriter or otherwise) shall be of the length and width of a half-sheet of foolscap paper, and shall be folded in half lengthwise; and it is recommended that all records for trial shall be enclosed or covered by a full sheet of foolscap or other covering of the same size.

11. Rule 545. All appeals to a Judge in Chambers in Q.B. and C.P. Divisions to be set down with the Clerk in Chambers and a fee of fifty cents paid therefor.

12. Præcipe orders under Rule 622 may be issued at any time by the officers with whom the pleadings have been filed, except for the purpose of issuing execution under Rule 886, in which case special leave is necessary; such orders to be entered in full under Rule 744.

13. Rule 1226. Orders for delivery of bills of costs to be granted as of course.

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WE publish an article on the Division Courts System in Ontario. The writer has had great experience and is most competent to deal with the subject. He makes some valuable suggestions. We trust some of them will receive early attention from those in authority. As to others they are open to question and modification; but as all of them merit consideration, we shall be glad to hear from those of our friends who have especial familiarity with the working of the People's Court.

WE cannot but be amused, notwithstanding that it savours almost too much of the truth to be amusing, when our lively and independent contemporary, *The Western Law Times*, refers to the appointment, in the Maritime Provinces, of the last batch of Queen's Counsel, in these words, "We confess that we have grave misgivings as to the completeness of this list. We fear that if a proper and exhaustive search be made, there will yet be discovered—gathering clams by the sad sea waves, doubtless—at least two members of the Bar in the Maritime Provinces who have not had this 'greatness thrust upon them.' We invoke the sympathy of the public to their lonely state. Their situation is mournful in the extreme."

THE DIVISION COURTS SYSTEM IN ONTARIO.

[COMMUNICATED.]

After many years of experience and various changes and accretions of jurisdiction and otherwise, since the construction of the Division Courts, we find that in the year 1887, the whole of the various enactments were consolidated (C.S.O., c. 51), containing no less than 304 sections. Since this, amendments, or rather, changes, have been made at each of the three sessions of the Legislature, since the consolidation; and these will go on *ad infinitum*. Some of the provisions which remain on the statute book have been only partially acted upon, or are effete, although they still remain unrepealed.

It is to be regretted that almost every member of the Legislature who chooses, brings in what is called an amendment of the Act, without proper revision and consideration on the part of the Government, much less by those who are acquainted with the workings of the system, and who might well be consulted as to the expediency or need of the measures proposed. Several of them have been so ill-considered as to lead to frequent embarrassment, and it is to be regretted that what has been aptly termed "the glaring eccentricities of Legislative activity," should be so frequently manifested, and obviously so, by the

persistence of those who conceitedly tinker with what they do not understand. Like the English County Court System there has been produced what experience has developed in England, "a fine crop of inconsistencies and absurdities."

The English County Courts were intended to be instruments for the cheap and speedy collection of small debts, and remedying minor torts, or doing justice to persons who are unable to seek redress in the higher courts; but the present is an expensive and cumbersome incongruity, far away from cheapness and speed.

For many years past it has been made possible for the province to be divided into County Court Districts, under which Judges could divide the work amongst themselves, and perform functions irrespective of the counties in which they respectively reside, and it is to be regretted that that principle was not embodied as a requirement by express provision of the Consolidated Division Courts Act. The tendency of the system in general has been to decentralize the administration of civil justice, but the jurisdiction and powers of the court have been confined principally to the original purpose for which small debts courts were instituted, excepting that it has been increased as to the amount involved or the value of property brought in question. We think it may now be seriously discussed whether the railroad system of our country, which makes it convenient for Judges to travel from place to place throughout the province, does not call for an ignoring of county lines, which on the map appear, for the most part, as if they had been traced out by the journeyings of analined angle worms; and that the boundaries and extent of Division Court Districts might, with great advantage to Judges and suitors, be abolished, and the districts of Division Courts reconstructed according to business centres and populations, and business requirements.

The principle which we believe prevails in England, that a Judge should not administer justice in a county where he was born or where he resides, is as applicable to this country now, as it ever was anywhere, and the advantage of having a stranger to the community to administer justice is so obvious that it strikes one with surprise that the principle does not seem to occur to those whose duty it is to provide for the proper administration of justice, especially when we know that its local application in certain parts of the province proceeds upon no principle whatever of local exigency which does not apply everywhere else in the province. The first thing to be secured is the confidence of the public, and the next the making of the court a useful and reliable instrument for administering justice between man and man; and where the instances of calling a jury in the Division Court are so few, it is all the more desirable that a Judge who acts both as Judge and jury, dealing with both law and fact, should be beyond local prejudice or the suspicion of partiality. Constituted as human nature is, it is not to be supposed that a Judge working in the same field and dealing largely with the same people, should not receive favorable impressions of the integrity and character of some and unfavorable of others who appear before him, and thereby necessarily and unwittingly become more or less prejudiced in their favor or against them. If he ever goes outside his office or his own house, or mixes with the people to any extent, as he necessarily must.

he, in like manner, receives impressions of the same kind; so that his associations from those sources weigh upon his judgment, and are somewhat manifested in his decisions, and thereby inspire distrust of his intregity.

The census of the country is shortly to be taken, not merely as to our population, but as to wealth and other circumstances, and the result would be suggestive as to how to divide the province properly into districts for the local administration of justice. Nothing would be easier than to define a basis on which the experience of those who have been engaged in the administration of the local courts could settle upon a better division than that which now exists. There is no reason whatever why one Judge should be called upon to try five hundred suits in a year, or another Judge one thousand or fifteen hundred, or possibly not more than one hundred, or why the time of one Judge should be occupied once or twice a month, whilst another Judge only holds courts once in every two months. The circuits might be mapped out, now that the railway system of the province, and the convenience of travel, have become so fully developed. As it is, some Judges, in order to avail themselves of this convenience, travel out of their own county, pass by places where Division Courts are held in other counties, in order to reach some distant point in their own county, thereby causing a needless waste of time and expense which a more convenient division of districts and the labor and duties of Judges might avoid. A Judge has very often to travel a whole day, and be away from the county town, where frequent applications are required to be made to him in chambers, in order to reach some distant place to hold a Division Court, where only one or two suits have to be disposed of, which might be very often avoided if some neighboring Judge were to add such a district to some adjoining district in his county. It has been known that, as a matter of expenditure, it would be far cheaper if a Judge, who was to hold such a court, would pay all the debts and costs involved in suits than perform the journey of going to the place where court has to be held; and it is very much the case in this province as it is found to be in England, where Sir R. Harrington stated in his evidence before a select committee in the House of Commons, that, as a rule, he had to travel three hours for every hour he sat in court, and said: "I heard of a case the other day where the Judge telegraphed to enquire what his work at a distant court would be. He was informed that there was one judgment summons for 4*s*. Like a sensible man he paid the money himself, and thus got rid of a long and expensive day's travel for nothing; and I think that every unprejudiced person would be of opinion that the whole of the circuit arrangements require revision with reference to 'Bradshaw's Guide,' and a shifting of the population into the towns."

As regards the jurisdiction of the courts over the subject matters, we think that the provision of the English County Court System, conferring jurisdiction in common law actions and without the written consent of both parties might be very well engrafted into our Division Courts System. Actions founded on contract, except actions for breach of promise of marriage, and without reference to signature of defendant, might very well be conferred. Actions founded on tort, excepting actions for malicious prosecu-

tion, libel, slander, and seduction, might also be conferred up to $100. Counter-claim, unless the plaintiff gives written notice of objection, should be conferred to an unlimited extent; and replevin, equity jurisdiction, and interpleaders transferred from the High Court. High Court actions on contract up to $200, and High Court actions on tort might be relegated to the Division Court up to $100. Jurisdiction should not be conferred capriciously. A court which can entertain an action for false imprisonment, or for assault and battery, might as well entertain a cognate action for malicious prosecution. If it may try an ordinary action of contract, if the sum claimed does not exceed $200 (where the amount is ascertained by the signature of the defendant), why should it not try any action up to that amount whether the amount is so ascertained or not?

It has been well suggested as regards the English County Court System, by Lord Bramwell, and several others, that any action for any amount might be brought in the High Court, or that the defendant might as of right remove it into the High Court if the sum claimed or questions involved exceeded the specified amount. Different amounts might be specified in different classes of business without any agreement; this would be a simple change from the rule which gives unlimited jurisdiction with the written consent of both parties, and in reality the change would be considerable, because it has been found that the law, as to written consent, is practically a dead letter, and when the parties are stripped for the fight "they will not shake hands over the tribunal."

Under section 79 of the Division Courts Act, in case the debt or damages claimed in an action brought in the Division Court amounts to $40 or upwards, and in case it appears to any of the Judges of the High Court that the case is a fit one to be tried in the High Court, and in case the Judge grants leave for that purpose, the action may, by writ of certiorari, be removed from the Division Court into the High Court upon such terms as the payment of costs, or other terms as the Judge making the order sees fit. As a matter of practice, this provision is notably a dead letter, as experience has shown, and throws a wide difference between providing for the consent to jurisdiction and leaving a party to object to it. The costs of solicitors are so high in the High Court and in the County Court, that many a suitor entitled to redress is prevented from resorting to *any* tribunal, fearing the heavy bill of costs which may be the result; and while it is not desirable to cheapen law, it will be conceded by all fair-minded men that the resort to competent tribunals should be facilitated wherever justice requires it. Small cases may be and are of great consequence to the parties themselves, and where a man has an honest claim there is no reason why he should not come into the court and set his claim before the Judge without the intervention of a legal agent. The Judge has frequently all the work to do where the facts have to be enquired into and sifted, because the parties themselves do not know how to present their cases. The Judge has to examine and find out the questions involved, and to apply the law to them all for himself; but the tribunal should be open to all such, and every man should resort to it with every confidence that an unprejudiced Judge and clear administration of right will deal fairly with him.

In England the administrative working of the County Courts is controlled by the department of the Treasury, presided over by an officer who is known as the Superintendent of County Courts. We have in this province an officer who is called the Inspector of the Division Courts, but his duties are not at all of the character of the Superintendent referred to; his being confined to inspecting the work of the clerks and bailiffs, and the books and courts papers, and to see that proper books are provided, that they are in good order and condition, proper entries and records are made therein, and to ascertain that the duties of the officers of the Division Courts were duly and efficiently performed, and to see that lawful fees only are taxed or allowed as costs, and, when directed to do so by the Lieutenant-Governor, to ascertain that proper security has been given, and exists, and that the security of officers of the court continue sufficient.

It is an essential of our Division Courts System, that there should be a superintending power for properly regulating and dividing the work of the courts, and changing from time to time the limits of the several Division Court Districts, so as to prevent "the creaking of machinery" supplied by the Legislature, and seeing that the system works with greater efficiency. This might very well be added to the department of the Attorney-General. All legislation should pass under the eye of, and be subject to the control and management of the Superintendent. He should be a man of long and wide experience, and the office of Inspector should be subject to his direct control. It would not add very greatly to departmental expense, would prevent friction, and exercise some control upon that ill-considered and perpetual craving for tinkering by legislation with a system which might be easily improved by persons whose experience might be availed of, but who, now, never seem to be consulted.

D. J. H.

COMMENTS ON CURRENT ENGLISH DECISIONS.

(Notes on the February Number of the Law Reports—continued).

COMPANY—SHARES ISSUED AT A DISCOUNT—WINDING UP—SURPLUS ASSETS—SHAREHOLDERS, RIGHTS OF.

In re Weymouth & Channel Islands Steam Packet Co. (1891), 1 Ch. 66, a question arose as to the proper mode of distributing surplus assets of a company which was being wound up. The matter in controversy arose under the following circumstances. The shares of the company for the amount of its original capital were £10 each, and were taken up and paid in full in cash. The company subsequently got into difficulties, and resolved to increase its capital. The market value of its shares at this time was £3 per share. By special resolution the company resolved that the shares for the new capital should be also nominally £10 each, but should be issued at a discount of £7 per share. In pursuance of this resolution, shares were issued as fully paid-up shares to allottees on payment of £3 per share; and the question submitted to the court was as to the relative rights of the holders of the original shares which were fully paid up, and the holders of the shares issued at a discount, as above mentioned. North, J., held that, though the issue of the shares at a discount was *ultra vires* of the com-

pany, the holders of those shares having been many years on the register of shareholders could not, under the circumstances, repudiate their shares, and claim repayment of the £3 per share paid by them, but that they must be treated as shareholders, having paid £3 per share; and that the surplus must be applied first in payment to the original shareholders of £7 per share on the shares issued at a discount, and that the residue of the fund would then be divisible among all the shareholders rateably. On appeal, it was argued for the holders of the shares issued at a discount that there was a contract binding on the other shareholders that the holders of the shares issued at a discount should stand on the same footing as those who held fully paid-up shares. But the Court of Appeal (Lindley, Bowen, and Fry, L.JJ.) were clearly of opinion that the only contract entered into was one with the company, and that there was none with the individual shareholders, and that the latter were not in any way bound by the illegal contract made by the company. The judgment of North, J., was therefore affirmed.

VOLUNTARY SETTLEMENT—VOLUNTARY ASSIGNMENT OF DEBTS—DEBTS GOT IN BY ASSIGNOR—LIABILITY OF SETTLOR'S ESTATE.

In re Patrick, Bills v. *Totham* (1891), 1 Ch. 82, a claim was made against the estate of a deceased person in an administration action under the following circumstances. The deceased had made a voluntary assignment of four certain debts to trustees, with power to sue for the debts, upon trust to sell and convert into money the trust premises, and execute and do such assurances and things as should be expedient, and to apply the proceeds for the benefit of the settlor's wife and other relatives. The debts assigned were secured by chattel mortgages, and there was no express assignment of the securities, nor were they given up to the assignees; and the latter did not give any notice of the assignment to the debtors. The settlor afterwards himself collected the debts, and died intestate, and the trustees now claimed to be creditors of his estate for the amount of the debts so received by the intestate. Kekewich, J., held that the four debts had been completely assigned by, and were subject to the trusts of, the settlement—and on appeal the Court of Appeal (Lindley, Bowen and Fry, L.JJ.) affirmed his decision.

VENDOR AND PURCHASER—MISLEADING CONDITION OF SALE—ASSUMPTION OF FACTS ON WHICH ROOT OF TITLE DEPENDS.

In re Sandbach & Edmondson (1891), 1 Ch. 99, the Court of Appeal (Lord Halsbury, L.C., and Bowen and Fry, L.JJ.), affirming Bristowe, V.C., held that a condition of sale requiring the purchaser to assume certain facts to be true is not misleading, if the vendor believes the facts to be true, even though the condition is intended to cover a flaw which goes to the root of the title; and in such a case it is not necessary to explain in the condition the specific defect in the title which the condition is intended to cover. Lord Halsbury, L.C., who gave the judgment of the Court, however, states that if the facts required to be assumed are known by the vendor to be untrue, the condition would be bad.

COMPANY—CONTRIBUTORY—SHARES ISSUED AS "PAID-UP" WITHOUT PAYMENT.

In re Johannesberg Hotel Co. (1891), 1 Ch. 119, is another decision of the Court of Appeal (Lord Halsbury, L.C., and Bowen and Fry, L.JJ.) as to the effect of shares being issued as "paid-up shares" where no payment had in fact been made. *Spargo's case*, L.R., 8 Chy.D. 407, had established that it is possible that a transaction between a company and an allottee of shares may amount to "a payment in cash," although no cash may in fact be paid by the allottee; and the question was whether in the present case there had been such a transaction between the company and the contributories. Here, the allottees of shares issued as "paid-up shares" without any payment being made, claimed to be creditors of the company, and shares were issued to them by the company as "paid-up shares" in part payment of this debt. The company being subsequently ordered to be wound up, the allottees of these shares were, by the order of Chitty, J., placed on the list of contributories, and from this order they now appealed. The Court of Appeal being of opinion that the appellants had failed as a matter of evidence to show the existence at the time of the allotment of any contract between the company to give, or the allottees to accept, the shares in satisfaction of their claim, they had not brought themselves within *Spargo's case*, which, though binding on the Court of Appeal, was evidently regarded by the Court as open to criticism. The *rationale* of the decision may be gathered from the following observation of Fry, L.J.: "Unless the contract of the hotel company to pay £3,750 to the prospecting company (the appellants), and the contract by the prospecting company to take 2,500 shares in the hotel company, were both subsisting contracts and binding on the two companies, on the 8th October (when the allotment was made), there were not debts on either side which could be extinguished by cross payments."

COMPANY—DEBENTURE-HOLDER—RECEIVER AND MANAGER.

Makins v. *Percy Ibotson & Sons* (1891), 1 Ch. 133, was an action by a debenture-holder of a company whose debentures purported to charge all the company's property both present and future, including its uncalled capital, and the plaintiff applied for the appointment of a receiver and manager of the company's business pending realization, with a view to enable the business to be sold as a going concern. The plaintiff was the sole debenture-holder. Kay, J., following a decision of Sir Geo. Jessel, M.R., in *Peck* v. *Trinsmaran Iron Co.*, 2 Chy.D. 115, made the order, though with some doubt, on the plaintiff undertaking to provide wages for the current expenses, and to be answerable for the receipts of the manager pending his giving security, and to procure the realization of the property as soon as possible.

COMPANY—REMUNERATION OF DIRECTORS—PERCENTAGE ON "NET PROFITS"—SALE OF UNDERTAKING.

Frames v. *Bultfontein Co.* (1891), 1 Ch. 140, was an action by a director of the defendant company to recover remuneration which by the articles was fixed at a sum equal to three per cent. on the "net profits" of the company in each year. The company had resolved on a voluntary winding-up, for the pur-

pose of selling its undertaking and assets to a new company; and a very large profit was made by this sale. The plaintiff claimed 3 per cent. on the profits so made; but Chitty, J., decided that the article in question only applied to the net profits made by the company as a going concern, and not to profits made by the sale of the undertaking and assets in a winding-up; that the directors' remuneration was intended to be a return for their services, to which the sale of the concern was not attributable. The action therefore failed.

COMPANY—WINDING-UP—SURPLUS ASSETS—ORDINARY AND PREFERENCE SHAREHOLDERS—RIGHTS OF, INTER SE.

In re Bridgewater Navigation Co. (1891), 1 Ch. 155, we have another case on company law. In this case there was a contest between ordinary and preference shareholders as to their respective rights in the surplus assets of the company which remained after payment of all liabilities. By the articles of association the directors might set aside out of profits sums as a reserve for specified purposes and other contingencies, in priority to dividends, and subject to that provision the entire profits in each year were to belong to the shareholders. Under a power in that behalf the capital had been increased by the issue of preferential shares with a fixed preferential dividend. The company's undertaking (a steamboat and navigation business) had been sold under an Act of Parliament, and there was a surplus in excess of the liabilities of the company and paid-up capital, and the contest was as to the rights of the shareholders in this surplus, and it was held by North, J., that (subject to the payment of an apportioned dividend on the preferential shares) the ordinary shareholders were entitled to the net profits of the current year, including a balance carried forward from the last year, and a sum reserved for canal improvements, but not so applied; but that they were not entitled exclusively to reserve funds set apart for insurance and depreciation of the company's property, nor to the excess of the net value of plant and works over the value thereof as estimated, nor to any moneys applied out of revenue to capital purposes.

COMPANY—BORROWING MONEY—MORTGAGE OF UNCALLED CAPITAL.

In re Pyle Works (1891), 1 Ch. 173, by the articles of association of a company the directors were empowered to borrow money on the uncalled capital, and it was provided that every director should be indemnified by the company from all loans incurred in the discharge of his duties. In 1882 the company, being in want of money, the directors applied to a bank to be allowed to overdraw the company's account, which was allowed on security being given by the promissory notes of two of the directors, it being verbally agreed that these directors should be indemnified by a charge on the uncalled capital, and the board passed a resolution that the directors who had made themselves liable should be indemnified. The same two directors also gave guarantees to a railway company in consideration of their giving credit for the carriage of goods for the company. The board of directors passed a resolution that a charge on the uncalled capital of the company should be given to the two directors in respect of the overdraft due the bank, and also in respect of the debt guaranteed to the railway company;

and a mortgage was accordingly executed in favor of the two directors pursuant to that resolution. The company being in liquidation, the directors claimed to be paid the amount of the charge. Their claim was contested by the unsecured creditors, on the ground that the guaranteeing of the debts was not a borrowing of money for which the unpaid capital could be mortgaged. Stirling, J., was of opinion, however, that the transaction as regards the overdraft was a borrowing of money for the purposes of the company, and that it was not essential that the security should be given to the lender, but that the mortgage in favor of the guarantors was authorized by the articles; and though the transaction with the railway company did not amount to a borrowing of money, yet that as the articles empowered the directors to issue securities founded on unpaid capital for any legitimate business purpose of the company, that the indemnifying the directors in respect of that claim was such a purpose, and therefore the mortgage was valid as to both claims.

COMPANY—WINDING-UP—PRACTICE—DEBENTURE-HOLDERS ACTION—RECEIVER—LIQUIDATOR—LEAVE TO CONTINUE ACTION.

In re Stubbs, Barney v. *Stubbs* (1891), 1 Ch. 187, is still another decision on a point of company law. In this case an action had been commenced by a debenture-holder against a company, and a receiver had been appointed; and subsequently a winding-up order had been granted; and two questions arose, first, whether the debenture-holder should be allowed to continue his action; and secondly, whether the receiver appointed in his action should be superseded by the liquidator appointed in the winding-up. Kekewich, J., as to the first branch of the application, decided to allow the action to be continued, holding that unless the liquidator is able and willing to give a plaintiff all that he is entitled to in the action without its continuance, the plaintiff ought to be allowed to proceed; and as to the second point, he held that although it is the usual practice in a winding-up to appoint one officer to represent both the company and the secured creditors, such as debenture-holders and mortgagees, yet that practice is not to be extended by appointing the liquidator to be receiver in place of a receiver appointed in the action by a debenture-holder, when the debentures purport to charge the whole of the assets of the company, both present and future, including uncalled capital.

Notes on Exchanges and Legal Scrap Book.

EVERY MAN NOT HIS OWN LAWYER.—The maxim that he who conducts his own cause has a fool for his client has been forcibly illustrated by a recent incident. A Mr. Robert Hymer has given a sum of £50,000 to Hull for a grammar school, and the foundation-stone was laid the other day. Mr. Hymer, it appears, came into all his wealth through his kinsman, the Rev. John Hymer, of Brandsburton, leaving him an annuity of £60, and bequeathing all the rest of his fortune, amounting to about £200,000, to Hull for a grammar school. Here it

is that the strange features of the case illustrating the above maxim come. In order to avoid paying a lawyer's fee, the Rev. J. Hymer had drawn his own will and so worded it that it became void under the Statute of Mortmain. Of course, the will not being provable, an intestacy resulted, and Mr. R. Hymer stepped in as his next-of-kin. It is stated that the case was so clear that the corporation did not even make any attempt to claim the money.—*Law Journal.*

IRISH ACCOUNTS.—The annual accounts of the Irish Supreme Court of Judicature, which were issued on Friday night, illustrate, writes a correspondent, in one or two small matters, the admirable minuteness with which the national accounts are kept. Twenty-three years ago a former Master of the Queen's Bench Division inadvertently paid twice over a sum of £7 2s. 3d. It would appear, accordingly to ordinary canons, that the proper thing to do was for the Master to refund this money out of his own salary. That, however, was not done, and accordingly to this day there stands in the ledger of the Supreme Court of Judicature an item of £7 2s. 3d., entered as a deficiency uncovered by any formal liability of the Consolidated Fund. Nor is this all. Ten years later another over-payment was made. This amounted to one shilling, and the accounts, though perfectly frank in other respects, withhold any clue to the position of the official responsible for it. Still darker mystery broods over a penny in suspense. No date is mentioned when this penny went wrong. All that is stated is that it was in the Chancery Division. It has never been settled whether this penny is owing to the Supreme Court of Judicature, or whether the Supreme Court owes it. Accordingly, year after year, it is entered as being "in suspense," and the Chancery Division is saddled with responsibility for it.—*Freeman's Journal.*

LIABILITY OF SLEEPING CAR COMPANIES.—*The New York Law Journal* has grouped the more important decisions of the United States Courts concerning the liabilities of sleeping car companies, and the rights of the travelling public, as follows: While the company is not liable as an insurer it is bound to furnish sleeping passengers with reasonable protection against theft, as from the very nature of the contract between the parties, it was intended that the passengers should not remain capable of protecting themselves. *Pullman Car Co.* v. *Gardner*, (3 Pennypacker [Penn.], 78), and *Carpenter* v. *N.Y., N.H., & H.R.R. Co.* The company is bound to have watch kept during the entire night (*Blum* v. *Southern Pullman Car Co.*, 3 Central Law Journal, 591).

The almost universal rule is that sleeping car companies are not liable as common carriers, or innkeepers, but only for negligence, and that the burden is upon the plaintiff to offer some proof of negligence in addition to the fact of loss. (See *Pullman Palace Car* v. *Lowe*, 30 Central Law Journal, 245).

On the question of measure of damage, it has been held that the responsibility extends only to a passenger's clothing and personal ornaments, the small articles of luggage usually carried in the hand, and a reasonable sum of money for travelling expenses, taking into consideration his circumstances in life. It

certainly would be inequitable to the company to charge it with liability for any indefinitely large sum which a man may choose to carry with him and place under his pillow. *Blum* v. *Southern Pullman Car Co.* (supra); *Root* v. *Sleeping Car Co.* (28 Mo. Appeals, 200). *Wilson* v. *B. & O.R.R.Co.* (32 Mo. Appeals, 682).

The two Missouri cases last cited hold, in addition to the propositions above laid down, that a passenger who leaves in his waistcoat, in his berth, a large sum of money, while he goes to the closet at the end of the car, is guilty of contributory negligence as matter of law. If a passenger, before retiring, leaves his clothing and valuables in an empty berth directly above him, which upper berth he has not hired and does not control, it is not as a matter of law such contributory negligence as will bar recovery for loss of the articles. (*Florida* v. *Pullman Car Co.*, 37 Mo. Appeals, 598).

The whole gist of the matter in these sleeping car decisions is that the contract contemplates the passenger's going to sleep, and that the company is therefore bound to take precautions to protect him from stealthy theft. If the passenger is awake the ordinary rules as to taking care of his own property apply. On this point it has been held (*Whitney* v. *Pullman Palace Car Co.*, 143 Mass., 243), where a passenger on a parlor car got off at a station for refreshments, leaving property on her seat which she did not put under the charge of defendant or its agents, and the same was stolen during her absence, that she was guilty of contributory negligence fatal to her action.

CAPITAL PUNISHMENT.—Some time ago Sir James Mackintosh, a most cool and dispassionate observer, declared that, taking a long period of time, one innocent man was hanged in every three years. The late Chief Baron Kelly stated as the result of his experience, that from 1802 to 1840, no fewer than twenty-two innocent men had been sentenced to death, of whom seven were actually executed. These terrible mistakes are not confined to England. Mittermaler refers to cases of a similar kind in Ireland, Italy, France, and Germany. In comparatively recent years there have been several striking instances of the fallibility of the most carefully constructed tribunals. In 1865, for instance, an Italian named Pelizzioni was tried before Baron Martin for the murder of a fellow-countryman in an affray at Saffron Hill. After an elaborate trial he was found guilty and sentenced to death. In passing sentence the judge took occasion to make the following remarks, which should always be remembered when the acumen begotten of a "sound legal training" and long experience is relied on as a safeguard against error: "In my judgment, it was utterly impossible for the jury to have come to any other conclusion; the evidence was about the clearest and most direct that, after a long course of experience in the administration of criminal justice, I have ever known. . . . I am as satisfied as I can be of anything that Gregorio did not inflict this wound, and that you were the person who did." The trial was over. The Home Secretary would most certainly, after the judge's expression of opinion, never have interfered. The date of execution was fixed. Yet the unhappy prisoner was

guiltless of the crime, and it was only through the exertions of a private individual that an innocent man was saved from the gallows. A fellow-countryman of his, a Mr. Negretti, succeeded in persuading the real culprit (the Gregorio so expressly exculpated by the judge) to come forward and acknowledge the crime. He was subsequently tried for manslaughter and convicted, while Pelizzioni received a free pardon. Again, in 1877, two men named Jackson and Greenwood were tried at the Liverpool Assizes for a serious offence. They were found guilty. The judge expressed approval of the verdict, and sentenced them to ten years' penal servitude. Subsequently fresh facts came to light, and the men received a free pardon. Once more, in 1879, one Habron was tried for the murder of a policeman. He was found guilty and sentenced to death. An agitation for a reprieve immediately followed. The sentence was commuted to penal servitude for life. Three years after, the notorious Peace, just before his execution for the murder of Dr. Dyson, confessed that he had committed the murder for which Habron had been sentenced. With these incidents fresh in our minds, let us turn once more to St. Giles and St. James, and listen to the indignant words of Douglas Jerrold: "Oh, that the ghosts of all the martyrs of the Old Bailey—and though our professions of faith may make moral antiquarians stare, it is our invincible belief that the Newgate Calendar has its black array of martyrs; victims to ignorance, perverseness, prejudice; creatures doomed by the bigotry of the Council table, by the old haunting love of blood as the best of cures for the worst of ills,—oh, that the faces of all these could look from Newgate walls! That but for a moment, the men who stickle for the laws of death as for some sweet domestic privilege might behold the grim mistake, the awful sacrilegious blunder of the past, and seeing, make amendments for the future." —*Fortnightly Review.*

PUBLICATION OF SPEECHES BY MEMBERS OF COMMONS.—In his Commentaries on the Constitution of the United States, Mr. Justice Story says: "Although a speech delivered in the House of Commons is privileged, and the member cannot be questioned respecting it elsewhere, yet if he publishes his speech, and it contains libellous matter, he is liable to an action and prosecution therefor, as in common cases of libel. And the same principles seem applicable to the privilege of debate and speech in Congress." § 866.

To this the following note will appear in the 5th ed. of the same work (now in the press), by the editor, Mr. Bigelow:—

The first sentence quoted would now be too broad a statement. A member of Parliament may certainly circulate among his constituents a speech made by him in Parliament. *Wason* v. *Walter*, L.R. 4 Q.B. 73, 95; *Davison* v. *Duncan*, 7 El. & B. 223, 229. (For the law of England before legislation see *Stockdale* v. *Hansard*, 9 Ad. & E. 1: *Wason* v. *Walter*, *supra*.) And it may be doubted whether any such qualification of the privilege as that suggested (of constituency) can be worked in this country. Practically, the qualification is everywhere ignored, if it exists. Members of Congress, if not of the State Legislatures, act upon the supposition that the circulation, by themselves, of their speeches is

(*prima facie*) privileged, and that the privilege is not limited in territory. And if such circulation is privileged, it cannot be limited in that way without absurd consequences. A member of the House of Representatives delivers a speech there, containing defamatory reflections upon some one; on the next day he is transferred to the Senate, and the same speech, with the same reflections, is delivered there; must the speaker be confined to the particular district which he represented in the House, in circulating the first speech, while he has the whole State for the second? Again, the subject of the reflections themselves may concern the whole country, as in the case of an impeachment; in such a case shall one who represents a very poor and degenerate constituency, *e.g.*, the lower part of the city of New York, have the right to circulate his speech there, where it will probably have no effect for any purpose, and be cut off from circulating it among more enlightened people? Again, if a "fair report" of the proceedings of the body may be published (without malice), by newspapers circulating generally, how can it be that a member of that body must not circulate his own speech—assuming that it contains or is accompanied with a fair report of the proceedings—beyond his constituency? Once more, a member's constituency is migratory part of the year, as from June till October; must the member withhold his speeches during that time for fear that, if he sends them for distribution, addressed generally to the postmaster of a common resort of his constituents, copies may be delivered to persons not of his district or State?

It is plain then that any concession that a member of the Legislature may send his speeches to his constituents is a yielding, in this country, of the whole argument (see *Story, ut supra*) against privilege in such cases. And, further, the existence of a privilege itself, for the circulation of a speech by the person who made it, is in ordinary cases warranted and required by the general rule already referred to, by which fair reports of the proceedings may be privileged. "In ordinary cases," we say, for generally the printed sheet contains a sufficient report of the occasion. The real difficulty, so for as there is any difficulty, is with the circulation of speeches which would not be privileged on the footing of a publication, *e.g.*, in the newspapers, of a fair report of the proceedings. And in regard to that case, it is hard to see any reason which can justify circulation among a member's constituency without justifying circulation generally. It is hard to justify either. The true rule, it is apprehended, should be to put the circulation of speeches altogether upon the footing of fair reports, justifying the speaker only as he would be justified as the publisher of a newspaper reporting to the world the proceedings of the Legislature.

It is now too late, however it may have been sixty years ago (Story wrote in 1832), to question a privilege of fair reports; and as for the doctrine of privilege itself, that of course is fundamental. Society could not long exist if to do harm, whether in self-protection or in the discharge of duty, were not permitted. It is only necessary that the justification should be limited to the reasonable requirements of the particular case. I may do harm to my neighbor only in so far as may reasonably appear necessary in the discharge of duty or in protecting myself, my family, or my property.

The privilege in question is of course of the kind called *prima facie;* that is, it exists on the footing that the act of the sender was not malicious—not done, *e.g.*, with an indirect motive of wrong. (As to malice in that sense see *Stevens* v. *Midland Ry. Co.*, 10 Ex. 356; *Abrath* v. *Northeastern Ry. Co.*, 11 Q.B.D. 440, 450, Bowen, L.J.; s. c. 11 App. Cas. 247.) But the mere sending a speech beyond one's constituency, far from establishing, could not even, in reason, be evidence of malice.—*Melville M. Bigelow in Harvard Law Review.*

AN INNKEEPER'S LIEN AND LIABILITY.—A lien is the right of a bailee to detain chattels until some pecuniary demand upon or in respect of them has been satisfied by the bailor. Such is the definition of a lien given by Mr. Wharton in his work on "Innkeepers," p. 116; and the learned author proceeds to show that there are two kinds of lien, particular and general, the innkeeper's lien being of the former kind, and arising from the fact that the innkeeper has to "bestow an extraordinary amount of care in the preservation of his guest's goods." Hence, the law in return gives him this power of retaining his guests' goods. The definition of a lien given in Brett's "Commentaries on the Present Laws of England," vol. 1, p. 426, is very similar to Mr. Wharton's. It is as follows: "The right to retain the property of another until some pecuniary demand upon or in respect of it has been satisfied by the owner. Liens are of two kinds, particular and general. A particular lien consists in the right to retain goods in respect of labor or money expended upon them. Particular liens are favored by the law." The truth of this last short sentence is borne out by the recent case of *Gordon* v. *Silber*, 59 Law J. Rep. Q.B., 507; L.R. 25 Q.B.D., 491. For two months Martin Silber paid his bills at the hotel at which he was staying. He was then joined by his wife, who brought with her a large quantity of luggage, and they remained at the hotel for about four months. When they left their bill was unpaid, and the hotel proprietors claimed a lien on the luggage brought by the wife, and retained it. A payment on account was subsequently made. The husband having become insolvent, the action which had been commenced against him and his wife was continued against her in respect of her separate estate for the balance of the bill. The wife defended the action on the ground that board, lodgings, etc., were provided by the hotel proprietors on the order and credit of her husband, and counter-claimed for delivery to her of the luggage retained as aforesaid. From the evidence it appeared that the plaintiffs had looked primarily to the husband for payment, but thought that they could always "go back" on the goods. The goods were unquestionably the wife's separate property. The case was tried by Lord Justice Lopes, sitting in the Queen's Bench Division. The Lord Justice held that the claim for payment against the wife could not be sustained, but that the lien had attached on the luggage; and in doing so expressed himself as follows: "If the guest has brought goods to the inn to which he has no title that will not deprive the innkeeper of his lien, because he is obliged to receive the guest without inquiries as to his title. It seems, therefore, the lien is commensurate with the obligation to receive the guest and to keep safely and securely

his goods. The right of lien of an innkeeper depends upon the fact that the goods come into his possession in his character of innkeeper as belonging to a guest." His lordship also pointed out that the lien would attach even if Mr. Silber had stolen the goods. Few will deny the reasonableness of this decision, and it is comforting to feel that, while married women are acquiring new rights, they are not able to shirk the correlative liabilities. It seems that in old days it was even doubtful whether the person of the guest could not have been detained when the bill was not paid, but there is now no doubt that this is not the law ("Cross on Lien," p. 343). The innkeeper is liable, as we have stated, for the safety of his guest's goods, but the relation of landlord and guest must be established before the liability will be incurred. This is shewn by the case of *Strauss* v. *The County Hotel and Wine Company*, 53 Law J. Rep. Q.B., 25; L.R. 12 Q. B. Div., 27. There the plaintiff arrived by train at Carlisle Station, and entrusted his luggage to a porter to be conveyed to an hotel belonging to the defendant company, where he intended to stay. A telegram which he received shortly after his arrival made him change his mind, but he took some refreshments, on the waiter's suggestion, in the refreshment room which forms part of the station, but belongs to, or, at all events, is under the management of the defendants, and is directly connected with the hotel by a covered way. He had previously directed the hotel porter to lock up his luggage. Later on the same day the plaintiff discovered that part of his luggage was lost, and he brought this action to make the proprietors of the hotel liable for it as innkeepers. "We do not," said the present Lord Chief Justice, in deciding against the plaintiff, "at all lay it down that no action would lie against the defendants as bailees if the loss were occasioned under such circumstances as would make them liable. No such question arises here, and what we decide is that there is no evidence here to establish the relationship of landlord and guest, which is necessary in order to make the defendants liable as innkeepers." Mr. Justice Mathew referred to the plaintiff's contention that the relationship of landlord and guest had been established either with the porter at the station or with the waiter in the coffee-room, but held that there was no evidence of the relationship contended for.—*Law Journal.*

CHINESE COURTS.—The course of American politics, we usually acknowledge, is like a stream flowing over shifting sands—liable to get a little muddy and sometimes to change its channel; but in contrast to this we point to our courts of justice, apart from turmoil, inaccessible to bribes, unswerved by the stress of party conflict. The Chinese have studied these courts, and though they can hardly pretend to have mastered the mysteries of their intricate apparatus, it strikes our critics that no system could be more skilfully designed for the purpose of defeating justice. A court consists of three elements—bench, bar, and jury, the second and third apparently serving no other ends than to prevent law and to screen the guilty. In China, where there is neither bar nor jury, the processes of law are not only more expeditious, but as the Chinese assert, more certain. In their eyes the jury is open to three objections: (1) while the weigh-

ing of evidence requires a trained mind, the jurors are chosen at random and are chiefly uneducated men; (2) their verdict is required to be unanimous, making conviction next to impossible in cases that admit of a difference of opinion; to secure impartiality, they are required to declare beforehand that they have formed no opinion on the subject; they are accordingly men who either do not read or do not reflect. In addition to these objections, much time is lost in impanelling a jury; and then the Judge has to instruct them how to understand the evidence. Why not permit the Judge and a couple of assessors to pass on the facts in the first place? It is amusing to an Oriental to learn that these jurors are locked up and deprived of food in order to compel them to agree, and that one man who can endure hunger longer than the others may thereby procure the release of a prisoner. Such is the palladium of our liberties—an institution which ranks among the noblest privileges of Magna Charta! As for the bar, in the estimation of the Chinese its theory is thoroughly immoral, and the practice founded on it is a game of trickery and deceit. One of our great writers gives a comical picture of a Judge who averred, when he had heard one side, that he could understand the case, but who always suffered from a confusion of ideas when he came to hear the other. The function of a lawyer is to compel a Judge to hear the other side. The lawyer, however, is by the rules of his profession permitted to present only a one-sided view of the case. He seeks not the triumph of right, but the success of his client. The opposing counsel strives to determine the court in a contrary direction, and between these contending winds the arrow of justice will not fail to go straight to the mark! Each advocate browbeats the other's witnesses; he lays snares for the unwary; and to weaken their testimony he does his best to ruin their reputations. One who has the gift of eloquence appeals to the sympathies or prejudices of the jurors, who, being unsophisticated men, are liable to be carried away by his oratory. He acquires a name for power over a jury, and the litigant who can offer him the heaviest fee is almost sure to win his suit. What an original scheme for the promotion of even-handed justice! In some of our courts our visitors see a statue representing a blindfolded goddess holding aloft a pair of scales. That emblem expresses perfectly the Chinese ideal of the character of a Judge, but to express ours it ought to exhibit the counsel for the litigants as doing their best by surreptitious means each to turn the scale in his own favor. The task of weighing rival claims in such circumstances must transcend even the powers of a goddess. By means of these aids to justice rogues are set free to prey on society; wills of honest testators are broken; creditors are defrauded of their dues; and more than all, through this cumbrous machinery the processes of law are rendered so expensive that the poor are deterred from attempting to defend their rights. Whatever else our Chinese visitors may borrow, they are pretty certain not to transplant either bar or jury.—*Forum.*

POPULAR LAW.—In Boswell's "Life of Johnson" a story is told of one Betty Flint, who was charged with stealing a counterpane. The Judge, who was partial to the fair sex, observed that the prisoner was good-looking, and let

her off. "And now," said Miss Betty Flint—"now that the counterpane is my own, I shall make it into a petticoat." The remark seemed uncalled for, and must have filled the minds of those present in court with a vague feeling that injustice had been done somehow and to somebody. But it is not unlikely that disinterested parties were pleased with the acquittal of the prisoner, because she was evidently a woman of some personal attractions. Now, it is a principle of English popular law, even to this day, that a pretty woman can commit no offence; or if she can, then that there are always extenuating circumstances. These extenuating circumstances are usually a good figure, bright eyes, plump cheeks, a well-shaped nose, and satisfactory lips.

When women produce an equal effect on public opinion with men, we shall probably find it laid down as a corollory to the principle above mentioned that a handsome man cannot transgress the law. The beauty of the race may then be expected to improve very rapidly, for it is clear that the ugly and law-abiding part of the community will be at the mercy of the unrestrained Venus and Adonis; they will consequently suffer severely in the battle of life, and probably not survive very long. It is already a noticeable fact that the handsome Latin races are less law-abiding than the pudgy-faced Teutons. Perhaps the explanation is to be found in the connection between good looks and inability to commit crime in the eyes of so-called administrators of the law.

A second principle of popular law is that if a man has been nearly convicted of a crime he ought to be punished to some extent. In such cases moral certainty ought to override legal technicalities. Thus there is a sentence on record of a western Judge which probably gave general satisfaction at the time it was pronounced. A man was charged with forgery and a number of other offences, but the prosecution succeeded in establishing only the charge of forgery. For this the Judge sentenced the prisoner to one year's imprisonment; "but," he added, "you are sentenced to an additional fourteen years for general cussedness." Nothing could be more in accordance with popular notions of justice.

Connected with this principle is the theory that when a serious crime has been committed a corresponding punishment ought to be meted out to someone or other, just as during the siege of Paris by the Germans it is related that people went about exclaiming that somebody ought to get shot. There were long periods when only buildings suffered, and though the French soldiers loudly proclaimed that they were ready to die for their country, somehow or other they failed to do it. This gave an air of unreality to the siege in its earlier stages—it was not business, and it was not war. It is the same in popular law. Thus some English travellers were once touring in Arabia, when they were set upon by a band of robbers and deprived of their baggage. They proceeded to complain to the local Cadi, who promised to bring the marauders to justice. When the day came on which the Cadi was accustomed to administer the law, the Englishmen were invited to attend the court, and were accommodated with seats on what, for want of a better word, may be called the bench. Coffee was handed round, and everything was done to make the Englishmen feel that they

were the objects of courteous sympathy. They were called upon to state their case, which they did, and found no difficulty in establishing it. "Well," said the Cadi, "what punishment would you like the prisoners to be subjected to? Shall they be scourged, or bastinadoed, or thrown into a dungeon? You have only to name the sentence, and I will pronounce it." The Englishmen decided in favor of scourging. "Bring in the prisoners," exclaimed the Cadi; and now for the first time those unhappy men were introduced into the court. "You are convicted," said the magistrate in his sternest tones, "of robbing these honorable Englishmen. It is intolerable that this kind of lawlessness should prevail, and you are sentenced to be scourged." In a moment the prisoners were stripped and the punishment began. "Stop!" exclaimed one of the Englishmen, "those are not the men!" "My dear friend," replied the Cadi, while the scourging continued merrily, "of course they are not the men. But they will do very well. It is perfectly impossible for us to catch the scoundrels who robbed you; but it is necessary in the interests of justice, that somebody should be punished for such offences, if only to bring home to the minds of the real robbers the kind of sentence that would be passed upon them if they were really caught." This theory of the scapegoat seems to have been almost instinctive with all peoples and at all times. In cases of doubt it insures that every offence shall be followed by an adequate punishment. If the offender can be punished, so much the better; if not, a "whipping-boy" or scapegoat must be punished instead. It is a curious idea, and very repugnant to enlightened modern thought; but it lingers on in unwritten popular codes of law, as may be gathered from the free and easy way in which mobs are wont to wreak their vengeance on the innocent when they are unable to touch the guilty.

Mob law is the law of passion and emotion. "I hate you; I never hate without good reason; therefore you are bad and ought consequently to be punished," this is its fundamental precept, and *mutatis mutandis*, we may put "love" for "hate." But this kind of argument is not confined to localized mobs merely; there is the rabble rout of sentimentalists who find in certain newspapers (which shall be nameless) a common rallying-ground. These men are fond of talking of the "Spirit of the Age." They would condemn the advocates of Lynch law; they would despise a Judge who was not impartial; but they think that in appealing to the Zeit-Geist, or Spirit of the Age, they are taking up a quite unexceptionable position. Now, the Spirit of the Age is nothing more than the emotions of Brown, Jones, and Robinson, the aforesaid sentimentalists, when they find that the law says one thing and they desire another. If a pretty woman is condemned to be hanged, Brown, Jones, and Robinson, scream in chorus that hanging women is opposed to the Spirit of the Age. But if an ugly old hag is sentenced to death, these worthy gentlemen read the account of her execution with complacent satisfaction. Our modern prætors, the Home Secretaries, are always getting into hot water because they fail properly to interpret this vague and shifting spirit; but the petitions and deputations with which they are pestered during periods of excitement are really nothing more than a thinly veiled attempt to revert to emotional or mob law.

"Is it not lawful for me to do what I like with my own?" is a question that is very often asked by persons not accustomed to "exact thought." A man's wife is his own; therefore he may beat her. A man's house is his own; therefore he may make it a nuisance to his neighbors. A man's life is his own; therefore he may take it. These are some of the deductions which are made every day from the above maxim of popular law. And we find even well educated persons drawing conclusions hardly less valid than those given above. Thus it is the commonest thing for women who have jilted their adorers to endeavor to retain the household goods given them in contemplation of marriage. So, too, a man who has attached "fixtures" to the house he rents will often loudly bemoan his fate at not being allowed to remove them when he goes into fresh quarters. The law of the land is here altogether out of sympathy with the popular notion of what law ought to be. The tenant has paid for the fixtures; he considers them his own; and yet he finds it is not lawful for him to do what he will with them.

There arises from all these conflicts between popular and statute law a vague distrust of the latter, which is not without its good results, inasmuch as it discourages too frequent lawsuits. "The law," wrote Charles Macklin, "is a sort of hocus-pocus seance, that smiles in yer face while it picks yer pockets; and the glorious uncertainty of it is of mair use to the professors than the justice of it." The above view has probably more followers than that of Hooker, who declared that "of law there can be no less acknowledged than that her seat is the bosom of God, her voice the harmony of the world; all things in heaven and earth do her homage; the very least as feeling her care, and the greatest as not exempted from her power." Perhaps, however, Macklin and Hooper speak of different kinds of law.—*London Globe.*

Correspondence.

GRAND JURIES.

To the Editor of THE CANADA LAW JOURNAL:

In a late issue of your journal you invite suggestions for a substitute for grand juries, and I have put my ideas in the shape of a bill, which with a little more consideration might provide a substitute without much trouble, judging from the success attending the proceedings in the County Judges Criminal Courts, in which, as a County Crown Attorney, I have had over sixteen years experience. It will lie with the local houses to abolish grand juries as no longer needed; there is no necessity for a special officer, as exists in Scotland. My suggestion is as follows:

Her Majesty, by and with the advice and consent of the Senate and House of Commons, enacts as follows:

1. That sections 140, 173, 174, 175, 176, and 177 of cap. 174, R.S.C., are hereby repealed, and the following substituted: "140, No bill of indictment for

any offence shall be presented for trial to any court unless the prosecutor or other person presenting such indictment has been bound by recognizance to prosecute or give evidence against the person accused of such offence, or unless the person accused has been committed to or detained in custody, or has been bound by recognizance to appear to answer to an indictment to be preferred against him for such offence, or unless the indictment for such offence is preferred by the direction of the Attorney or Solicitor-General for the Province, or by the direction or with the consent of a court or Judge having jurisdiction to give such direction or to try the offence."

2. That the second schedule to said chapter 174 is hereby amended by striking out the words "the jurors for our Lady the Queen upon their oath present," wherever they occur in the forms in said schedule, and substituting therefor the words "on behalf of our Lady the Queen it is charged."

3. That after a prisoner has been committed for trial or has elected, in the County Judges Criminal Court, to be tried by a jury, the County Crown Attorney, or other officer representing the Crown, shall prepare an indictment setting forth the offence for which the prisoner has been committed and present it to the then next Criminal Court having jurisdiction, at the opening of such court.

4. That it shall be no objection to such indictment that the offence complained of be charged both as a felony and as a misdemeanor and in any number of ways, so long as only one offence is charged therein, but this section shall only apply to indictments charging a felony.

5. That the prisoner so committed for trial and indicted as aforesaid shall, on the opening of said court, or so soon thereafter as may be convenient, be arraigned upon such indictment.

6. That upon and after arraignment the same proceedings for the trial of the prisoner shall be had as are now had upon the trial of the prisoner upon an indictment.

7. The Attorney or Solicitor-General, Presiding Justice or Judge, may direct an indictment to be preferred against any one whom a grand jury may now indict.

8. That the officer representing the Crown as aforesaid, shall before presenting an indictment to the court, endorse thereon the names of the witnesses intended to be called, in chief, by the Crown.

9. That the duties heretofore imposed on grand juries are hereby imposed on the Counsel for the Crown, County Crown Attorney, or other officer representing the Crown, as the case may be.

Yours, etc., COUNTY ATTORNEY.

ELECTION OF BENCHERS.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—As the statutory election of Benchers is soon to take place, I venture to suggest that it should, as a matter of prudence, be preceded by a proper pro-

cess of enquiry and selection, and that nothing ought to be taken for granted when important interests are at stake and a responsible franchise has to be exercised by the electors.

The honor of the profession would be best subserved were certain methods, in themselves objectionable, eschewed, and essential enquiries into personal character and gentlemanly instincts and fitness of habits properly and fairly made.

Let us examine what are the methods of some electors. A circular is formulated and forwarded to electors, purporting to give an account of a meeting of a local Bar Association—where, in point of fact, no such association has been formed—or, we will say, from some other quarter a circular is issued by a coterie, presented in the name of the "Local Bar," informing the electors elsewhere, that the choice of the so-called "Local Bar" has fallen upon Mr. So-and-so, who is nothing more than the choice of the clique. At the same time the circulars ask all and sundry, in the other counties, to support their respective nominees, undertaking at the same time in return to support whatever candidate may be nominated and notified to them, as the choice of the persons receiving the circulars.

In a few days another circular is received by the same electors contradicting one of those first sent, whereby it is announced that two other persons have been nominated and their names forwarded as the choice of the "Local Bar!"

The effect of these and the absurdity of this perversion of the objects of the election law of the Law Society, and the consequences they might lead up to, are only too obvious and deplorable to need elucidation.

Let me give you, sir, a practical example, which I refer to with reluctance; but it is, nevertheless, my duty to state a fact, *i.e.*, that in the county in which I reside, nothing short of a political canvass has been set on foot to ensure the election of an old practitioner, who has, I frankly acknowledge, merits which I will mention, but whose demerits, such as want of dignity and intemperate habits, totally unfit him for so honorable and responsible an office. He stands fairly in his profession; under ordinary circumstances he is a good, clever lawyer and has a good repute abroad (where his habits are not generally known), but whom, in other respects, such as infirmity of temper, intemperate habits, and ungentlemanly instincts, it would be hard to beat, and would be no honor to the Bench of the Law Society. If drinking in low dives; if becoming occasionally saturated with whiskey; if pettifogging and bullying before Justices of the Peace, as a means of "shining as a whale amongst minnows" for the edification of the unwashed million; if abusing, in the lowest, meanest language, the counsel opposed to him; if "spread-eagleism" and bombast and vulgar arrogance; if superficial coloring and gloss, as a make-believe for profundity; if performing unprofessional pranks before a petty Magistrate's Court in the country—which he would not dare attempt in a regular Court of Justice—afford an outfit for the position, then he is the man, and he ought to be elected.

All I can say further to the members of the profession abroad who think otherwise, is to enquire into the pranks that some men "cut up" at home,

where they think there is no account taken of their habits and arrogance and ungentlemanlike demeanor. Do not be satisfied to act upon their general professional repute or success, or by the accident of the silk gown (which has ceased to be a mark of honor in the profession); or by the political status which has caused the Attorney-General to entrust to their care the conducting of the Crown prosecutions at the Assizes? Enquire of those who know them and their characters and habits; do not elect a man who, after he is a Bencher, might be seen, when thirsty, tripping across Queen street, to get a drink in any of the low dives near Osgoode Hall! as he does in his own county.

Recently a scene occurred before a Bench of Magistrates in a country village of one of the western counties, wherein I practice my profession, which beggars description, for it was a cruel and disgraceful fanfaronade, enacted between a Queen's Counsel, who performed the part of fanfaran, who is a candidate for re-election to the Bench, on the one hand, and a junior member of the Bar, on the other; both on the same side of politics. The latter had, in the exercise of the right of private judgment at the meeting of the Law Association, a few days before, favored the nomination of another person as the local candidate for the Bench, at and for which the learned Queen's Counsel took umbrage and bottled up his wrath, to be uncorked for this magistrate's show. The occasion was not one from which the legal profession derived one particle of respect or sympathy. The exhibition was simply disgraceful; it was not one calculated to inspire respect for one "wearing silk" and holding Her Majesty's commission as one of Her Counsel learned in the law.

To the electors I say, in repetition, enquire and judge for yourselves. If the profession has no honor to guard and no important interests to conserve, let the thing go; but as for me, I will not vote for any such man, I care not who nominates him.

Let me remind the electors, in conclusion, of the old proverb, "*Cucullus non facit monachum!*" and that neither seniority at the Bar, nor the silk gown, nor reputation abroad, nor political intrigue, *per se*, is not, or all combined are not, the only essential qualifications to the Bench of the Law Society.

FIAT JUSTITIA, RUAT CŒLUM.

DIARY FOR MARCH.

1. Sun. .....*3rd Sunday in Lent.* St. David.
3. Tues.....General Sessions and County Court Sittings for trial in York.
5. Thur.....York changed to Toronto, 1834.
8. Sun.....*4th Sunday in Lent.*
9. Mon.....Civil Assizes at Toronto.
10. Tues.....Court of Appeal sits. Prince of Wales married, 1863.
13. Fri.....Lord Mansfield born, 1704.
15. Sun.....*5th Sunday in Lent.*
16. Mon.....Chancery Sittings H.C.J. at Toronto.
17. Tues.....St. Patrick's Day.
18. Wed.....Arch. McLean, 8th C.J. of Q.B., 1862. Sir John B. Robinson, C.J., Ct. of Appeal 1862.
19. Thur.....P. M. S. Vankoughnet, 2nd Chancellor of U. C., 1862.
22. Sun.....*6th Sunday in Lent.* Palm Sunday.
23. Mon.....Sir Geo. Arthur, Lieut.-Governor of Upper Canada, 1838.
26. Thur.....Bank of England incorporated, 1694.
27. Fri. .....Good Friday.
28. Sat.....Canada ceded to France, 1632.
29. Sun.....*Easter Sunday.*
30. Mon.....Easter Monday. B.N.A. Act assented to, 1867. Lord Metcalfe, Gov.-General, 1843.
31. Tues.....Slave trade abolished by Britain, 1807.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

Div'l Court.] [Dec. 31.

CUMMING *v.* LANDED BANKING AND LOAN COMPANY.

Trusts and trustees—Executors—Breaches of trust—Taking securities in name of one of two joint executors and trustees as "trustee"—Pledging securities for advance—Misapplication of moneys advanced—Following securities in hands of pledgee.

The judgment of BOYD, C., 19 O.R. 426, affirmed.

E. Blake, Q.C., and *Mackelcan*, Q.C., for the defendants.

A. H. Marsh, Q.C., for the plaintiffs.

Div'l Court.] [Dec. 31.

HYATT *v.* MILLS.

Crown patent—Construction—Land described as "north part" of lot—Uncertainty—Tax sale—Adverse occupation—R.S.O., c. 193, s. 191.

A patent of land from the Crown is to be upheld rather than avoided, and to be construed most favorably for the grantee.

Where land was granted by a Crown patent describing it as the north part of lot 13, containing sixty acres, and the original plan of the township showed the lot with centre line running through the concession, and showed the part south of the line as one hundred acres, and the part north of the line as eighty acres; and it appeared that, prior to the grant of the north part, there had been a grant of the southerly part, containing one hundred acres, describing it by metes and bounds, which were evidently intended to include all the land south of the line, although they actually fell short of doing so,

Held, in a contest between the plaintiff claiming under the patentee of the north part and the defendant claiming under sales for taxes based upon the lands sold being patented lands, that the patent was not void for uncertainty, but that under the words "the north part" the whole of the lot lying to the north of the centre line passed to the grantee and those claiming through him

Doe Devine v. *Wilson*, 10 Moo. P.C. 502; *Nolan* v. *Fox*, 15 C.P. 565; *Regina* v. *Bishop of Huron*, 8 C.P. 253, specially referred to.

At the time of the conveyances to the plaintiff's predecessor in title and to himself, the defendant was in adverse occupation of lands sold for arrears of taxes, having a *bona fide* claim or right thereto, derived mediately under the sales for taxes.

Held, that, although the sales may have been invalid, s. 191 of R.S.O. c. 193, applied to them, and the conveyances, as regards the lands sold for taxes, were void; and want of knowledge of the adverse occupation on the part of the plaintiff and his predecessor could not alter its effect.

Douglas, Q.C., and *Moss*, Q.C., for the plaintiff.

Matthew Wilson, Q.C., for the defendant.

Div'l Court.] [Dec. 31.

ISRAEL *v.* LEITH.

Easement—Severance of tenement by conveyance—Rights of drainage and aqueduct—Implied grant—Express grant—Notice—Registry laws.

Where the owner of two adjoining lots of land conveys one of them, he impliedly grants to the grantee all those continuous and apparent easements which are necessary for the reasonable use of the property granted, and which are

at the time of the grant used by the owner of the entirety for the benefit of the part granted; and rights of drainage and of aqueduct are within this category of easements.

The owner of two adjacent semi-detached houses, built upon separate lots, conveyed one house and lot and retained the other. The one conveyed was drained and supplied with water through the other. The plaintiff claimed an easement for the house so conveyed over the other house, which had been subsequently conveyed to the defendant. In the conveyance under which the plaintiff claimed there were general words sufficient to pass the rights claimed by way of express grant. This conveyance was registered before that to the defendant.

Held, that the plaintiff was entitled as against the defendant to the rights claimed, whether these rights were to be treated as arising under an implied or an express grant; if the Registry Act were to be left out of consideration, the plaintiff claiming under a prior legal grant, although an implied one, would not be effected by the fact that the defendant claiming under a subsequent grant, although an express one, was a purchaser without notice; if the rights in question were to be treated as arising under an implied grant, they were outside the effect of the Registry Act, and must prevail by reason of priority; if the rights were to be treated as arising under an express grant, although the Registry Act would apply, there was nothing in it to take away the rights acquired by the plaintiff; and the conveyance under which the plaintiff claimed, being duly registered, though not directly against the defendant's lot, was notice of the conveyance of everything which, according to law, passed under the description contained in it or as incident thereto.

Dicta of PATTERSON, J.A., in *Carter* v. *Grasett*, 14 A.R. at pp. 709, 710, dissented from.

Bicknell for the plaintiff.

Kappele for the defendant.

Div'l Court.] [Dec. 31.

ONTARIO INVESTMENT ASSOCIATION *v.* SIPPI.

Company—Calls—R.S.O. c. 157, s. 45—Validity of transfer of shares.

The plaintiffs, who were incorporated under the Ontario Joint Stock Companies' Letters Patent Act, R.S.O. c. 157, sued the defendant for a call upon certain shares of their capital stock subscribed for by them at the time of their incorporation in 1880. The defendant made a transfer of these shares in 1887, before any actual call had been made by the directors; but it was contended that there was a statutory call by virtue of s. 45 of the Act, and that by s. 48 the transfer, otherwise valid, was invalid for non-payment of such call.

It is provided by s. 45 that "not less than ten per centum upon the allotted stock of the company shall, by means of one or more calls, be called in and made payable within one year from the incorporation of the company."

Held, that a call under the Act means a call made by the directors in pursuance of the powers given to them by the Act, s. 44; that s. 45 is directory only; and that the neglect of the directors to make the call thereunder had not the effect of making the defendant in arrear for the ten per centum in respect of his shares so as to prevent his making a transfer of them.

W. R. Meredith, Q.C., for the plaintiffs.

Gibbons, Q.C., for the defendant.

Chancery Division.

Full Court.] [Jan. 19.

SHORE *v.* SHORE.

Power of appointment—Defective appointment—Appointment by will instead of by deed.

Where one by deed of trust provided that certain lands shall go to his three children in default of appointment by deed, and afterwards made a will under seal, whereby he devised as residue "all the rest of my estate, real and personal, to which I shall be entitled at the time of my decease, to W.," who was one of the three children,

Held, that this could not be regarded as an execution of the power of appointment, nor even as such a defective execution as equity would aid.

Per MEREDITH, J. There is no significance in the fact of the will being sealed, in this province, at all events, when the sealing as well as the signing of wills is so common a practice.

W. Cassels, Q.C., for the plaintiff.

Smith, Q.C., for the executors.

Idington, Q.C., for the other defendants.

Full Court.] [Jan. 19.

TRUSTEES R.C. SEPARATE SCHOOL *v.* TOWNSHIP OF ARTHUR.

Separate schools—Incorporation—R.S.O., 1887, c. 227, ss. 21-24.

When a notice to convene a public meeting of persons desiring to establish a Separate school for Roman Catholics was given, purporting to be a notice within ss. 21-23 of the Separate Schools Act, R.S.O., 1887, c. 227, but which appeared to have been signed by six persons, of which two were residents of School Section No. 9, whereas the others were residents of School Section No. 10, and one was, moreover, not the head of a family,

Held, affirming the judgment of FERGUSON, J., that there had been no valid incorporation of the proposed trustees of the Separate school.

Per BOYD, C. It is sound doctrine that in the acquisition of corporate powers the methods prescribed by the Legislature should be substantially and even strictly followed.

R.S.O., 1887, c. 227, s. 67, does not extend to a disagreement which involves the original status as a corporate body upon an objection raised by the municipality wherein the alleged Separate school corporation seeks to exercise taxing and governmental powers, but applies to matters of internal economy and regulation wherein the legal status of the trustees as a corporation is assumed. Other parts of the Separate school law considered by MEREDITH, J.

Hoyles, Q.C., and *Guthrie*, Q.C., for the plaintiff.

Kingstone, Q.C., for the defendants.

ROBERTSON, J.] [Jan. 30.

FULLER *v.* ANDERSON.

Will—Construction—Words importing entail applied to personal estate.

A testator, whose estate consisted wholly of personalty, made his will in the following words: "I give, devise, and bequeath all my real and personal estate of which I may die possessed to Ellen Cedar, . . . to have and to hold unto her and the heirs of her body through her marriage with me, their and each of their sole and only use forever."

Held, that Ellen Cedar was entitled absolutely to the residue of the estate.

M. Cowan for the plaintiffs.

Hoyles, Q.C., for the adult defendant.

J. Hoskin, Q.C., for the infant defendant.

BOYD, C.] [March 4.

HICKEY *v.* HICKEY ET AL.

Will—Devise—Misdescription of land.

A testator owning lots 6 and 8 in the 1st concession, devised the same in his will in two devises, as "My property known as lot x x x., 2nd concession, etc."

Held, that his lots in the 1st concession passed.

A. McKechnie for the plaintiffs.

J. Hoskin, Q.C., for the infant.

Practice.

MR. HODGINS.] [Dec. 23.

REILY *v.* CITY OF LONDON.

Discovery—Examination of person by surgeons.

In an action to recover damages for bodily injuries caused to the plaintiff by the alleged negligence of the defendants,

Held, that the court had no power to order the plaintiff to attend and submit to an examination of her person by surgeons chosen by the defendants.

Swabey for the defendants, the City of London.

W. H. Blake for the other defendants.

Middleton for the plaintiff.

[Affirmed by STREET, J., 7th March, 1891.]

BOYD, C.] [Feb. 11.

TOWNSHIP OF LOGAN *v.* KIRK.

Costs—Taxation—Defendants severing—Counsel fee on examination of witnesses out of the jurisdiction—Costs of examination for discovery.

In an action by a municipality against a contractor, one of his sureties and the executors of a deceased surety, three separate defences were delivered by different solicitors. It did not appear that the separate solicitors were employed for the mere purpose of increasing costs.

Held, that the defendants were not liable in any joint character, and were entitled to tax separate bills of costs. Upon taxation a fee was properly allowed for counsel in British Columbia attending upon examination of witnesses there. An objection that a person examined by the defendants for discovery was not an officer or representative of the plaintiffs should have been

taken at the outset and was not open on taxation.

Douglas Armour for the plaintiffs.

C. J. Holman, *J. M. Clark*, and *W. M. Douglas*, for the defendants.

BOYD, C.] [Feb. 16.

IN RE HIBBARD.

Infant—Sale of land—Benefit of parent—R.S.O., c. 137, s. 3.

The statute R.S.O., c. 137, s. 3, cannot be used to sell an infant's estate for a parent's benefit.

Origin of the enactment.

A. C. Galt for the infant's father.

J. Hoskin, Q.C., for the infant.

STREET, J.] [Feb. 23.

CROIL *v.* RUSSELL.

Venue — Change of — Convenience — Cause of action.

Where the balance of convenience was in favor of a trial of an action at Pembroke rather than at Cornwall, where the plaintiffs laid the venue, it was changed to Pembroke.

Held, that, had the scales been more evenly balanced than they were, the fact that the cause of action arose in the County of Renfrew should decide the question in favor of Pembroke, the county town of Renfrew.

W. H. Blake for the plaintiffs.

Douglas Armour for the defendants.

BOYD, C.] [March 2.

ODELL *v.* MULHOLLAND.

Venue—Change of—Convenience—Cause of action—View of locus in quo.

In an action to establish a right of way over land in the County of Wentworth, the venue was changed from Brantford to Hamilton, it appearing that there was a slight preponderance of convenience in favor of Hamilton.

Held, that the facts that the subject matter of the litigation was situate in the County of Wentworth, and that a view by the jury might be necessary, were facts to be considered in fixing the place of trial.

S. A. Jones for the plaintiff.

W. M. Douglas for the defendants.

BOYD, C.] [March 3.

KEEN *v.* CODD.

Parties—Mortgage action—Personal representative of deceased mortgagor—Infants—Devolution of Estates Act—Rules 309, 1005.

In a mortgage action for foreclosure, although it may be that since the Devolution of Estates Act as a matter of title, the record is complete with the general administrator of the deceased owner of the equity of redemption as the sole defendant; yet, as a matter of procedure, the infant children of the deceased are proper parties, and as such should appear as original defendants, unless some good reason exists for excluding them.

Rules 309 and 1005 considered.

Hoyles, Q.C., for the plaintiff.

J. Hoskin, Q.C., for the infants.

STREET, J.] [March 6.

CONNOLLY *v.* MURRELL.

Discovery—Examination for — Husband and wife—R.S.O., c. 61, s. 8.

Sec. 8, cap. 61, R.S.O., which provides that "No husband shall be compellable to disclose any communication made by his wife during the marriage," is still in force.

It is competent for a husband who is making disclosures of what took place between his wife and himself during coverture, at any time during an examination for discovery to refuse to disclose anything further. If, upon such refusal, the solicitor for the opposite party withdraws, the examination may be proceeded with, and the evidence so taken will not be struck out.

E. R. Cameron for the plaintiff.

Talbot Macbeth for the defendant.

Appointments to Office.

REGISTRAR OF DEEDS.

County of Hastings.

Henry Wright Day, of the Town of Trenton, in the County of Hastings, Esquire, M.D., to be Registrar of Deeds in and for the said County of Hastings, in the room and stead of William H. Ponton, Esquire, deceased.

LOCAL MASTER.

County of Frontenac.

John Maule Machar, of the City of Kingston, in the County of Frontenac, one of Her Majesty's

Counsel learned in the Law, to be Local Master of the Supreme Court of Judicature for Ontario, in and for the said County of Frontenac, in the room and stead of James Alexander Henderson, Esquire, deceased.

DISTRICT ATTORNEY AND CLERK OF THE PEACE.

County of Dufferin.

Elgin Myers, of the Town of Orangeville, in the County of Dufferin, Esquire, to be Clerk of the Peace and County Attorney for the said County of Dufferin, in the room and stead of John Peter Macmillan, Esquire, resigned.

SHERIFF.

County of Renfrew.

Thomas Murray, of the Town of Pembroke, in the County of Renfrew, Esquire, to be Sheriff in and for the said County of Renfrew, in the room and stead of James Morris, Esquire, deceased.

CLERK OF THE PROCESS.

Province of Ontario.

Alexander Macdonell, of the City of Toronto, in the County of York, Esquire, to be Clerk of the Process, in the room and stead of James Strachan Cartwright, Esquire, appointed *pro tempore.*

ASSOCIATE-CORONERS.

County of Northumberland.

Richard Thorburn, of the Village of Colborne, in the County of Northumberland, Esquire, M.D., to be an Associate Coroner within and for the said County of Northumberland.

District of Thunder Bay.

Geoffrey Strange Beck, of the Town of Port Arthur, in the District of Thunder Bay, Esquire, M.D., to be an Associate Coroner in and for the said District of Thunder Bay.

County of York.

Opie Sisley, of the Village of Ellesmere, in the County of York, Esquire, M.D., to be an Associate Coroner in and for the said County of York.

DIVISION COURT CLERKS.

County of Essex.

William Mann, of the Village of Comber, in the County of Essex, Gentleman, to be Clerk of the Ninth Division Court of the said County of Essex.

County of Kent.

Archibald Samson, of the Town of Blenheim, in the County of Kent, Gentleman, to be Clerk of the Fourth Division Court of the said County of Kent, in the room and stead of Malcolm Samson, resigned.

District of Manitoulin.

James Munro Fraser, of the Village of Gore Bay, in the District of Manitoulin, Gentleman, to be Clerk of the First Division Court of the said District of Manitoulin.

Herman Currie, of the Village of Little Current, in the Temporary Judicial District of Manitoulin, Gentleman, to be Clerk of the Second Division Court of the said District of Manitoulin, in the room and stead of Samuel McLean, resigned.

William J. Tucker, of the Village of Manitowaning, in the District of Manitoulin, Gentleman, to be Clerk of the Third Division Court of the said District of Manitoulin.

County of Simcoe.

John C. McNab, of the Town of Barrie, in the County of Simcoe, Gentleman, to be Clerk of the First Division Court of the said County of Simcoe, in the room and stead of Allan J. Lloyd, left the country.

County of Waterloo.

William Dolman Watson, of the Village of Ayr, in the County of Waterloo, Gentleman, to be Clerk of the Seventh Division Court of the said County of Waterloo.

County of Wellington.

Henry Clarke, of the Village of Elora, in the County of Wellington, Gentleman, to be Clerk of the Sixth Division Court of the said County of Wellington, in the room and stead of Hugh Hamilton, deceased.

DIVISION COURT BAILIFFS.

County of Essex.

Joseph Lupien, of the town of Windsor, in the County of Essex, to be Bailiff of the Sixth Division Court of the said County of Essex, in the room and stead of William Mann, (appointed to be Clerk of the Ninth Division Court of the said County).

Raphael Marion, of the Township of Tilbury West, in the County of Essex, to be Bailiff of the Ninth Division Court of the said County of Essex.

County of Hastings.

William Henry Garratt, of the town of Trenton, in the County of Hastings, to be Bailiff of the Ninth Division Court of the said County of Hastings, in the room and stead of Lewis Cruickshank, resigned.

Benoni Haskel Sweet, of the Village of Bancroft, in the County of Hastings, to be a Bailiff of the Twelfth Division Court of the said County of Hastings.

County of Lincoln.

Richard E. Boyle, of the Village of Merritton, in the County of Lincoln, to be Bailiff of the Second Division Court of the said County of Lincoln, in the room and stead of James S. Clements, resigned.

District of Manitoulin.

Peter J. Anderson, of the Village of Gore Bay, in the District of Manitoulin, to be Bailiff of the First Division Court of the said District of Manitoulin.

Donald McKenzie, of the Village of Little Current, in the District of Manitoulin, to be Bailiff of the Second Division Court of the said District of Manitoulin.

John Gorley, of the Village of Manitowaning, in the District of Manitoulin, to be Bailiff of the Third Division Court of the said District of Manitoulin.

County of Victoria.

William Glass, of the Village of Omemee, in the County of Victoria, to be Bailiff of the Fourth Division Court of the said County of Victoria, in the room and stead of Isaiah Thornton, resigned.

County of Waterloo.

Edward Bourchier, of the Township of Blenheim, in the County of Oxford, to be Bailiff of the Seventh Division Court of the County of Waterloo.

County of Wellington.

S. B. Trask, of the Village of Drayton, in the County of Wellington, to be Bailiff of the Seventh Division Court of the said County of Wellington, in the room and stead of George Mellis, deceased.

COMMISSIONERS FOR TAKING AFFIDAVITS FOR USE IN ONTARIO

City of Montreal.

George Henry Ancrum, of the City of Montreal, in the Province of Quebec, Accountant, to be a Commissioner for taking Affidavits within and for the said City of Montreal, and not elsewhere, for use in the Courts of Ontario.

Rienzi Athel Mainwaring, of the City of Montreal, in the Province of Quebec, Esquire, to be a Commissioner for taking Affidavits within and for the City of Montreal, and not elsewhere, for use in the Courts of Ontario.

County of London (England).

Alexander James Murray, of No. 1 Clements' Inn, in the City of London, in that part of the United Kingdom of Great Britain and Ireland, called England, Gentleman, Solicitor, to be a Commissioner for taking Affidavits within and for the County of London, and not elsewhere, for use in the Courts of Ontario.

City of Chicago.

William Alexander Stolts, of the City of Chicago, in the State of Illinois, one of the United States of America, Gentleman, Attorney-at-Law, to be a Commissioner for taking Affidavits within and for the said City of Chicago, and not elsewhere, for use in the Courts of Ontario.

Flotsam and Jetsam.

GOVERNOR FERRY, as we learn from the San Francisco *Law Librarian*, recently wrote the following to an applicant for an appointment as notary: "In response to a written request of twenty of the magnates of Seattle, you have been appointed to the exalted, honorable, and lucrative position of notary public. I ask you, however, to bear in mind one responsibility that may devolve upon you. In the event that there should be an invasion of the state by a foreign foe, I shall probably call out the notaries public of the state, instead of the militia, as the former outnumber the latter by several hundred." Probably those troops would "swear" terribly and "protest" loudly.—*Albany Law Journal.*

A LEARNED judge of French extraction lately pronounced the following remarkable sentence on a man accused of stealing a horse:

"Prisoner, de evidence is conflicting, but I find you guilty and sentence you to dree months in de guard-room. De evidence, as I say, is very conflicting, but if I was sure, if I was *quite* sure, dat you stole dat horse, I would give you two years in de Manitoba penitentiary!"—*Central Law Journal.*

WHEN practising at the Bar, the late Baron Dowse had to deal with a case in which certain pigs had been injured in a fire on board a steamer. "Gentlemen of the jury," he said, "it was a rash act on the part of the owners (of the steamer) to allow these pigs to be lost, but to allow them to be roasted was a rasher."—*Irish Law Times.*

H. L. STROHM says that the most expressive will he ever saw was one filed in southwestern Kansas. It is as follows: "I declare this to be my last will and testament. I claim to be perfectly sound in body, but I do not presume to assert that I am sound in mind. I would not stultify myself by setting up such a pretension. I have about $10,000 of invested funds. What an immense amount of hypocrisy, fraud, and dishonesty I could buy with that amount. I thought first of bequeathing it to a charity. But what's the use? The greatest benefactors of humanity are war and cholera. Besides, I owe a debt of gratitude to my wife, who lives I don't know where. She rendered me the greatest service in her power– she abandoned me one fine day and I never heard of her since. In remembrance of this kind act I shall make her my sole legatee; however, on the express condition that she shall remarry at once. In this way I shall know that my death was regretted by one human being at least."—*Albany Law Journal.*

"LOOK ON THIS PICTURE, AND ON THAT."—Can two entirely different opinions (asks the *Law Gazette*) be entertained upon the same subject, and both be correct? The other day a correspondent came across the following poetic effusion, which expressed the opinion of a gentleman who had been asked whether a lawyer's life was worth living, or not:

"He lives for those that trust him,
For those that know him true,
For the work that lies about him,
Ready for him to do;
For the cause that needs assistance,
For the wrongs that need resistance,
For the future in the distance,
For the good that he can do."

Having read this, our Sunderland representative turned to his *Hudibras*, and found the following passage. The quiet but stinging sarcasm of the one is so different from the laudatory sentiment of the other, that the comparison is at least amusing:

"Lawyers have more sober sense
Than t' argue at their own expense,
But make their best advantages
Of others' quarrels, like the Swiss;
And out of foreign controversies,
By aiding both sides, fill their purses;
But have no interest in the cause
For which th' engage, and wage the laws.
Nor further prospect than their pay,
Whether they lose or win the day."

—*Irish Law Times.*

Law Society of Upper Canada.

THE LAW SCHOOL, 1891.

LEGAL EDUCATION COMMITTEE.

CHARLES MOSS, Q.C., *Chairman.*

C. ROBINSON, Q.C. Z. A. LASH, Q.C.
JOHN HOSKIN, Q.C. J. H. MORRIS, Q.C.
F. MACKELCAN, Q.C. J. H. FERGUSON, Q.C.
W. R. MEREDITH, Q.C. N. KINGSMILL, Q.C.

This notice is designed to afford necessary information to Students-at-Law and Articled Clerks, and those intending to become such, in regard to their course of study and examinations. They are, however, also recommended to read carefully in connection herewith the Rules of the Law Society which came into force June 25th, 1889, and September 21st, 1889, respectively, copies of which may be obtained from the Secretary of the Society, or from the Principal of the Law School.

Those Students-at-Law and Articled Clerks, who, under the Rules, are required to attend the Law School during all the three terms of the School Course, will pass all their examinations in the School, and are governed by the School Curriculum only. Those who are entirely exempt from attendance in the School will pass all their examinations under the existing Curriculum of The Law Society Examinations as heretofore. Those who are required to attend the School during one term or two terms only will pass the School Examination for such term or terms, and their other Examination or Examinations at the usual Law Society Examinations under the existing Curriculum.

Provision will be made for Law Society Examinations under the existing Curriculum as formerly for those students and clerks who are wholly or partially exempt from attendance in the Law School.

Each Curriculum is therefore published herein accompanied by those directions which appear to be most necessary for the guidance of the student.

Curriculum of the Law School, Osgoode Hall, Toronto.

Principal, W. A. Reeve, Q.C.

Lecturers: E. D. Armour, Q.C.
A. H. Marsh, B.A., LL.B., Q.C.
R. E. Kingsford, M.A., LL.B.
P. H. Drayton.

The School is established by the Law Society of Upper Canada, under the provisions of rules passed by the Society with the assent of the Visitors.

Its purpose is to promote legal education by affording instruction in law and legal subjects to all Students entering the Law Society.

The course in the School is a three years' course. The term commences on the fourth Monday in September and closes on the first Monday in May; with a vacation commencing on the Saturday before Christmas and ending on the Saturday after New Year's Day.

Students before entering the School must have been admitted upon the books of the Law Society as Students-at-Law or Articled Clerks. The steps required to procure such admission are provided for by the rules of the Society, numbers 126 to 141 inclusive.

The School term, if duly attended by a Student-at-Law or Articled Clerk is allowed as part of the term of attendance in a Barrister's chambers or service under articles.

The Law School examinations at the close of the School term, which include the work of the first and second years of the School course respectively, constitute the First and Second Intermediate Examinations respectively, which by the rules of the Law Society, each student and articled clerk is required to pass during his course; and the School examination which includes the work of the third year of the School course, constitutes the examination for Call to the Bar, and admission as a Solicitor.

Honors, Scholarships, and Medals are awarded in connection with these examinations. Three Scholarships, one of $100, one of $60, and one of $40, are offered for competition in connection with each of the first and second year's examinations, and one gold medal, one silver medal, and one bronze medal in connection with the third year's examination, as provided by rules 196 to 205, both inclusive.

The following Students-at-Law and Articled Clerks are exempt from attendance at the School.

1. All Students-at-Law and Articled Clerks attending in a Barrister's chambers or serving under articles elsewhere than in Toronto, and who were admitted prior to Hilary Term, 1889.

2. All graduates who on the 25th day of June, 1889, had entered upon the *second* year of their course as Students-at-Law or Articled Clerks.

3. All non-graduates who at that date had entered upon the *fourth* year of their course as Students-at-Law or Articled Clerks.

In regard to all other Students-at-Law and Articled Clerks, attendance at the School for one or more terms is compulsory as provided by the Rules numbers 155 to 166 inclusive.

Any Student-at-Law or Articled Clerk may attend any term in the School upon payment of the prescribed fees.

Students and clerks who are exempt, either in whole or in part, from attendance at The Law School, may elect to attend the School, and to pass the School examinations, in lieu of those under the existing Law Society Curriculum. Such election shall be in writing, and, after making it, the Student or Clerk will be bound to attend the lectures, and pass the School examination as if originally required by the rules to do so.

A Student or Clerk who is required to attend the School during one term only, will attend during that term which ends in the last year of his period of attendance in a Barrister's Chambers or Service under Articles, and will be entitled to present himself for his final examination at the close of such term in May, although his period of attendance in Chambers or Service under Articles may not have expired. In like manner those who are required to attend during two terms, or three terms, will attend during those terms which end in the last two, or the last three years respectively of their period of attendance, or Service, as the case may be.

Every Student-at-Law and Articled Clerk before being allowed to attend the School, must present to the Principal certificate of the Secretary of the Law Society shewing that he has been duly admitted upon the books of the Society, and that he has paid the prescribed fee for the term.

The Course during each term embraces lectures, recitations, discussions, and other oral

methods of instruction, and the holding of moot courts under the supervision of the Principal and Lecturers.

During his attendance in the School, the Student is recommended and encouraged to devote the time not occupied in attendance upon lectures, recitations, discussions or moot courts, in the reading and study of the books and subjects prescribed for or dealt with in the course upon which he is in attendance. As far as practicable, Students will be provided with room and the use of books for this purpose.

The subjects and text-books for lectures and examinations are those set forth in the following Curriculum :

FIRST YEAR.

Contracts.

Smith on Contracts.
Anson on Contracts.

Real Property.

Williams on Real Property, Leith's edition.

Common Law.

Broom's Common Law.
Kerr's Student's Blackstone, books 1 and 3.

Equity.

Snell's Principles of Equity.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

SECOND YEAR.

Criminal Law.

Kerr's Student's Blackstone, Book 4.
Harris's Principles of Criminal Law.

Real Property.

Kerr's Student's Blackstone, Book 2.
Leith & Smith's Blackstone.
Deane's Principles of Conveyancing.

Personal Property.

Williams on Personal Property.

Contracts and Torts.

Leake on Contracts.
Bigelow on Torts—English Edition.

Equity.

H. A. Smith's Principles of Equity.

Evidence.

Powell on Evidence.

Canadian Constitutional History and Law.

Bourinot's Manual of the Constitutional History of Canada. O'Sullivan's Government in Canada.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to the above subjects as shall be prescribed by the Principal.

THIRD YEAR.

Contracts.

Leake on Contracts.

Real Property.

Dart on Vendors and Purchasers.
Hawkins on Wills.
Armour on Titles.

Criminal Law.

Harris's Principles of Criminal Law.
Criminal Statutes of Canada.

Equity.

Lewin on Trusts.

Torts.

Pollock on Torts.
Smith on Negligence, 2nd edition

Evidence.

Best on Evidence.

Commercial Law.

Benjamin on Sales.
Smith's Mercantile Law.
Chalmers on Bills.

Private International Law.

Westlake's Private International Law.

Construction and Operation of Statutes.

Hardcastle's Construction and Effect of Statutory Law.

Canadian Constitutional Law.

British North America Act and cases thereunder.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

During the School term of 1890-91, the hours of lectures will be 9 a.m., 3.30 p.m., and 4.30 p.m., each lecture occupying one hour, and two lectures being delivered at each of the above hours.

Friday of each week will be devoted exclusively to Moot Courts. Two of these Courts will be held every Friday at 3.30 p.m., one for the Second year Students, and the other for the Third year Students. The First year Students will be required to attend, and may be allowed to take part in one or other of these Moot Courts.

Printed programmes showing the dates and hours of all the lectures throughout the term, will be furnished to the Students at the commencement of the term.

GENERAL PROVISIONS.

The term lecture where used alone is intended to include discussions, recitations by, and oral examinations of, students from day to day, which exercises are designed to be prominent features of the mode of instruction.

The statutes prescribed will be included in and dealt with by the lectures on those subjects which they affect respectively.

The Moot Courts will be presided over by the Principal or the Lecturer whose series of lectures is in progress at the time in the year for which the Moot Court is held. The case to be argued will be stated by the Principal or Lecturer who is to preside, and shall be upon the subject of his lectures then in progress, and two students on each side of the case will be appointed by him to argue it, of which notice will be given at least one week before the argument. The decision of the Chairman will be pronounced at the next Moot Court, if not given at the close of the argument.

At each lecture and Moot Court the roll will be called and the attendance of students noted, of which a record will be faithfully kept.

At the close of each term the Principal will certify to the Legal Education Committee the names of those students who appear by the record to have duly attended the lectures of that term. No student will be certified as having duly attended the lectures unless he has attended at least five-sixths of the aggregate number of lectures, and at least four-fifths of the number of lectures of each series during the term, and pertaining to his year. If any student who has failed to attend the required number of lectures satisfies the Principal that such failure has been due to illness or other good cause, the Principal will make a special report upon the matter to the Legal Education Committee. For the purpose of this provision the word "lectures" shall be taken to include Moot Courts.

Examinations will be held immediately after the close of the term upon the subjects and text books embraced in the Curriculum for that term.

The percentage of marks which must be obtained in order to pass any of such examinations is 55 per cent. of the aggregate number of marks obtainable, and 29 per cent. of the marks obtainable on each paper.

Examinations will also take place in the week commencing with the first Monday in September for students who were not entitled to present themselves for the earlier examination, or who having presented themselves thereat, failed in whole or in part.

Students whose attendance at lectures has been allowed as sufficient, and who have failed at the May examinations, may present themselves at the September examinations at their own option, either in all the subjects, or in those subjects only in which they failed to obtain 55 per cent. of the marks obtainable in such subjects. Students desiring to present themselves at the September examinations must give notice in writing to the Secretary of the Law Society, at least two weeks prior to the time fixed for such examinations, of their intention to present themselves, stating whether they intend to present themselves in all the subjects, or in those only in which they failed to obtain 55 per cent. of the marks obtainable, mentioning the names of such subjects.

Students are required to complete the course and pass the examination in the first term in which they are required to attend before being permitted to enter upon the course of the next term.

Upon passing all the examinations required of him in the School, a Student-at-Law or Articled Clerk having observed the requirements of the Society's Rules in other respects, becomes entitled to be called to the Bar or admitted to practise as a Solicitor without any further examination.

The fee for attendance for each Term of the Course is the sum of $10, payable in advance to the Secretary.

Further information can be obtained either personally or by mail from the Principal, whose office is at Osgoode Hall, Toronto, Ontario.

The Canada Law Journal.

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A BILL, introduced by the Attorney-General, now before the Legislative Assembly, contains a provision for the appointment of a second Junior Judge for the County of York, and also enables the concurrent sittings of the County Court, Court of General Sessions, and the Division Courts. It is also provided that there shall be weekly sittings throughout the year, with the exception of the month of August, of the First and Tenth Division Courts; monthly sittings of the same for the hearing of judgment summonses, and bi-monthly sittings for jury cases. The Senior and either of the Junior Judges together, as also the Lieut.-Governor, shall have authority to appoint other sittings for any of the above purposes. The necessity for more frequent sittings of the "Poor Man's Court" has been so long felt, that this measure affords but tardy justice. That a large increase in the number of suits may be expected can be inferred from the undoubted fact that many just claims are not now pressed owing to the delay so often met with by the debtor being served just "too late for this court," which means the delay of a month before the trial of the case. The change intended by this Act has been long required and demanded by both the profession and the public, and we have good authority for believing that the appointment will be made without delay.

IT is too often a characteristic of diseases affecting the mind that they leave the unhappy victim altogether unconscious of the terrible deterioration that is going on; and what is patent to all the world is too often, perhaps in mercy, hidden from the sufferer himself. The comments which have lately appeared in several English papers in reference to one of the English Judges, indicate that the Judge in question has arrived at such a mental condition that he has become quite unfit to discharge his judicial duties, and yet that he is himself, apparently, altogether unconscious of the fact. The tenure by which the Judges hold their office frees them in a large measure from the control of the executive, and this is necessarily so in order to secure their independence; but it also renders it an extremely difficult matter to remove a Judge who has become mentally incompetent to perform his duty. He may, as in the present case, refuse to resign, and unless he commit some positive wrong, amounting to a breach of good behavior, he cannot be removed, except upon an address of both Houses of Parliament, and it is hard both on the public and the Judge himself that he should be exposed to this cruel alternative.

The possibility of a Judge becoming insane, or imbecile, has not been taken into account, but it is obviously a very important contingency to be guarded against, and it is possible that legislation will be found necessary in order to provide for such unfortunate cases. We observe that a recent capital case, which would in ordinary course have come up for trial before the Judge referred to, was, by some judicial engineering, transferred to another sittings. The spectacle of a man being put in peril of his life before a Judge who has become lunatic, or imbecile, would be a mockery of justice too dreadful to contemplate. It is bad enough that suitors in civil proceedings should be exposed to having their rights determined before such a tribunal.

THE unlawful imposition of taxes on Her Majesty's liege subjects is, as we all know, a very serious offence; it was the moving cause of one unfortunate monarch losing his head; and, therefore, when the highest personage in the realm has suffered so severe a penalty, it is somewhat extraordinary to find that much smaller fry should dare to venture on so rash a course.

We learn from the pages of a contemporary that the Registrars of the High Court of Justice have embarked on this hazardous enterprise, and we are naturally led to tremble for their safety. It appears that in agreeing that the 50c. fee imposed by the tariff for setting down appeals from Chambers should in cases in the Q. B. and C. P. Division hereafter be paid to the Clerk in Chambers instead of to the Clerk of Records and Writs, as provided by *Rule* 545, they have, in effect, imposed a new and unlawful tax on a much suffering profession. The point is a very fine one, so fine that some stupid people will hardly be able to see it; but it is all the better for that from a legal point of view.

Now is the time for some chivalrous Hampden to step forward and resist to the death this constitutional iniquity. Unfortunately, in this prosaic age the Bench are not at all up to the mark on great constitutional questions of this kind. We remember once hearing that in the great case of *Jackson* v. *Richards* (we think it was) the Clerk of the Court had demanded a fee, which counsel objected to pay. When the case came before the Court, the great question as to the lawfulness of the Clerk's demand was about to be solemnly argued, when the learned Chief Justice, who at that time swayed the Court of Common Pleas, inquired of the Clerk how much the fee in dispute might be—we think it was 50c. He then beckoned the usher to approach, and having dived into his pocket he produced the necessary coin, with which he directed the stamp in question to be procured and applied to the document which was considered to be in need of that adornment, and then blandly asked the learned counsel to proceed with the merits of his case, if it had any. Such, alas, is the way great constitutional questions are burked by an unimaginative bench in these degenerate days!

UNLICENSED CONVEYANCERS.

We call attention to the letter of "Fair Play," on this subject, which will be found in another place. It is scarcely necessary to reproduce the advertisements referred to by our correspondent; it may, however, shortly be said that they contain, as usual, statements that the advertiser "makes out deeds, mortgages, wills, and aggreements *(sic)*, for one dollar, lends money on low interests, buys good mortgages, acts as assignee in trust, collects debts, probates wills, closes mortgages for one half the usual price." He also describes himself in the advertisement of a mortgage sale as "vendor's attorney." In a third advertisement he says that "Every assignment in trust for the benefit of creditors should be made to —— (that is, the advertiser), if experience, care, promptness, security, economy, personal attention, and the best results are desired; wills, probates, and all necessary papers prepared for administrators. All kinds of blank forms for sale."

It is nothing new for us to bring this system of piracy by unlicensed conveyancers to the notice of the profession and the Law Society. The supineness of the latter, and the exigencies of party politics, have left the profession a prey to the class referred to. It is idle to abuse the latter or to remonstrate with them; they see their way to making a living in that direction, and those who should be the protectors of the profession apparently "love to have it so." The Provincial Government, at the head of which is a professional man of high standing and repute, with a Cabinet in which are several lawyers, takes no notice. The leader of the Opposition, also a lawyer, with lawyers in his following, also takes no notice. It has been said that the fact of there being several Division Court agents and unlicensed conveyancers, members on both sides of the House, and that a large army of them, outside the House, are political partizans and wirepullers through the country, is sufficient explanation why the Legislature makes no effort to protect the legal profession. This protection is claimed by the profession at large, *not as a matter of favor, but as a matter of right and honesty;* and protection of a similar character is accorded to and enforced by every other profession in this country.

So far as the Law Society is concerned, we can quite understand that leading counsel, who are the moving spirits in the Law Society, do not, owing to the position they occupy, comprehend the situation, nor appreciate the position in which practitioners are placed by this want of protection. Spasmodic efforts are made from time to time, when Benchers are being elected, to introduce into the governing body of the Law Society those who understand the difficulty and feel the pressure. So far, however, this has come to nothing. We have endeavored to do our part in the matter, and cannot but feel a sense of disappointment that no result has followed from any of the exertions put forth as well by ourselves as by others who understand the situation and appreciate the gross injustice perpetrated. Like them, we have a deep sense of the wrong done. It would be strange if there were not on the part of those interested a sense of astonishment at the lack of interest on the part of our governing body, as well as contempt for those in authority, whose position demands that they should do justice in the premises, and who could easily do it if they would, but who have so far neglected their duty.

COMMENTS ON CURRENT ENGLISH DECISIONS.

The Law Reports for March comprise (1891) 1 Q.B., pp. 317-430; (1891) P., pp. 129-162; (1891) 1 Ch., pp. 201-398; and (1891) A.C., pp. 1-80.

BAILOR AND BAILEE—ESTOPPEL—JUS TERTII.

Rogers v. *Lambert* (1891), 1 Q.B. 318, was an action of detinue by bailors against their bailees for the goods bailed, which consisted of a quantity of copper. It was admitted that the plaintiffs before action had sold the copper to a firm of Morrison & Co., who had paid the price of it, and that the plaintiff had indorsed the delivery orders to Morrison & Co., but before action the plaintiffs had notified the defendants not to deliver the copper to any one but themselves. The defendants did not profess to be defending the action for, or by the authority of, Morrison & Co., but they admitted that they were defending it in their own interest. By an order of the Court the copper was sold, and the proceeds paid into Court. Day, J., before whom the action was tried, held, on the above state of facts, that the plaintiffs had no interest, and gave judgment for the defendants, and ordered the money to be paid out to them, which was done; but, on appeal, the Court of Appeal (Lord Esher, M.R., and Lindley and Lopes, L.JJ.) came to the conclusion that the law on the subject had been correctly laid down by Blackburn, J. ("a judge who knew more about these matters than any one else," as Lord Esher remarks) in *Biddle* v. *Bond*, 6 B. & S. 225, viz., that as between a bailor and bailee, under an ordinary contract of bailment, the bailee must, if he desires to defend an action for the non-delivery of the goods upon the demand of the bailor, show that he has already delivered them upon a delivery order authorized by the bailor, or he may ask for an interpleader order, or he may at his own risk, as regards the plaintiff, say, "I defend this action on behalf of A.B., and I say that he is the person really entitled to the goods," and if he takes the latter course he must not only allege the title of the third party but must prove it, and if he does not prove it he has no defence. To use the language of Pollock, C.B., in *Thorn* v. *Tilbury*, 3 H. & N. 537, a bailee can set up the title of another only "if he defends upon the right and title, and by the authority of," that person. The judgment of Day, J., therefore, was reversed, and the plaintiffs not objecting, the money was ordered to be repaid into Court, and liberty was given to any person claiming the copper to apply for its payment as if he were a party to the action, and the defendants were directed to serve notice of the order upon Morrison & Co., and all persons known by them to claim any interest in the copper or money.

PRACTICE—NEW TRIAL—STAY OF EXECUTION.

In *Monk* v. *Bartram* (1891), 1 Q.B. 346, the action had been tried by Grantham, J., with a jury, and judgment given in favor of the plaintiff; a stay of execution had been applied for and refused. The defendant now applied to the Court of Appeal to stay the execution pending an appeal to that Court, but that Court (Lord Esher, M.R., Bowen and Fry, L.JJ.) held that to warrant the granting of

the application special circumstances must be shown; and that allegations that there had been misdirection, and that the verdict was against evidence or the weight of evidence, were not sufficient ground for granting the stay.

PRACTICE—APPEAL—EXTENSION OF TIME FOR ENTERING THE APPEAL.

In *Cusack* v. *London & N.W. Railway Co.* (1891), 1 Q.B. 347, the Court of Appeal (Lord Esher, M.R., and Bowen and Fry, L.JJ.) may be said to have given the finishing blow to the practice laid down by that Court in the time of Sir George Jessel, as to the principles upon which leave to appeal after the time has expired may be granted. The notion that a judgment gave a party "a vested interest," which could not be disturbed unless the opposite party proceeded strictly according to the *Rules*, has now been pretty well demolished, and may, we presume, now be consigned to the limbo of discarded judicial opinions. In this case application was made for leave to appeal in a County Court case after the time had expired, and the Divisional Court (Pollock, B., and Charles, J.) refused the application, considering that they were bound by the view expressed by the Court of Appeal in *Collins* v. *Paddington*, 5 Q.B.D. 368, that there is a distinction in the practice as to granting an extension of time according to whether the application is made before or after judgment; but Bowen, L.J., stated that that case "belonged to a period in which stricter views on this point were held," and that since that time eminent judges had one and all come round to the conclusion that in such a matter no hard and fast line could be laid down, but that each case must be considered solely on its merits. Here the slip was accidental on the part of the appellants' solicitor, and the leave was granted.

CRIMINAL LAW—CONCOCTION OF FALSE EVIDENCE TO BE USED ON AN ARBITRATION—ATTEMPT TO PERVERT THE COURSE OF JUSTICE.

The Queen v. *Vreanes* (1891), 1 Q.B. 360, was a case reserved for the Court for Crown Cases Reserved. The prisoner was indicted for having abstracted from a bag a certain sample of wheat and substituted in its place another of a better quality, with a view to its being produced in evidence before arbitrators in case any should be appointed under the contract for the sale and purchase of the wheat of which the bag in question purported to contain a sample. The Court (Lord Coleridge, C.J., and Pollock, B., Stephen, Charles, and Laurance, JJ.) were agreed that this was an attempt to pervert the course of justice, and was a fraud or cheat at common law which constituted an indictable offence, notwithstanding that the piece of evidence was not in fact used before the arbitrators; and the conviction of the prisoner was therefore confirmed.

MARINE INSURANCE—MUTUAL INSURANCE ASSOCIATION—ACTION BY PERSON BENEFICIALLY INTERESTED, BUT NOT A PARTY TO POLICY.

In *Montgomerie* v. *United Kingdom Mutual Steamship Association* (1891), 1 Q.B. 370, the plaintiffs were part-owners of a vessel which had been insured by another part-owner in his own name with a mutual insurance association of which he was a member, and which association, according to the terms of the memorandum of association, was formed for the purpose of insuring ships of members,

and ships which members might be authorized to insure in their own names. The policy was in favor of the part-owner by whom the insurance was effected, and the rights of the plaintiffs as part-owners were not disclosed. The action was brought by the plaintiffs against the association to recover for a loss on the policy; but Wright, J., held that the action could not be maintained, thus establishing the converse of the rule laid down by the Court of Appeal in *United Kingdom Mutual Steamship Association* v. *Nevill*, 19 Q.B. 110 (see *ante* vol. 23, p. 291), where it was held that a person not a member of the association could not be sued for the assessments needed to make good losses, on the ground of his being an undisclosed principal for whose benefit an insurance was effected.

SPECIAL STATUTORY REMEDY FOR RECOVERY OF MONEY—PROCEEDINGS UNDER SPECIAL ACT, BAR TO CIVIL ACTION.

In *Vernon* v. *Watson* (1891), 1 Q.B. 400, Pollock, B., and Charles, J., following *Knight* v. *Whitmore*, 53 L.T.N.S. 400, held that where a statute gave a special remedy for the recovery of money misappropriated, including imprisonment, if the money were not paid, and the special remedy had been pursued, but had proved ineffectual to recover the money, that nevertheless a civil action for the money was barred.

INSURANCE—ACCIDENT—CONSTRUCTION OF POLICY—TIME, COMPUTATION OF—INSURANCE "FROM" A DATE—"ANY ONE ACCIDENT."

In *The South Staffordshire Tramways Co.* v. *The Sickness & Accident Assurance Association* (1891), 1 Q.B. 402, two points of construction were decided. The action was on a policy of insurance against "claims for personal injury in respect of accidents caused by vehicles for twelve calendar months from November 24, 1887," to the amount of "£250 in respect of any one accident." On 24th Nov., 1888, one of the plaintiffs' tram-cars was overturned, and forty persons were injured, and the plaintiffs became liable to pay claims which, in the aggregate, amounted to £833. The first question was whether the accident had happened within the period insured. Day and Laurance, JJ., held that it had, that the expression "from" excluded the 24th November, 1887, but included the 24th November, 1888. The other point raised was whether the accident was "one accident," and whether, therefore, the defendant's liability was limited to £250: or whether the injury to each of the forty persons was a separate accident, and their liability extended to the aggregate amount of the several claims. Day, J., held that it was but one accident, and the plaintiffs were only entitled to £250, but Laurance, J., was of a contrary opinion; and the Court of Appeal (Lord Esher, M.R., and Bowen and Fry, L.JJ.) were unanimous in agreeing with Laurance, J., that, according to the true intention of the policy, the injury to each person constituted a separate accident, and, therefore, that the plaintiffs were entitled to recover the whole £833.

BILL OF EXCHANGE—INFANT—NECESSARIES—BILL OF EXCHANGE ACT, (53 VICT., C. 33, S. 22, C.).

In re Soltykoff (1891), 1 Q.B. 413, the Court of Appeal (Lord Esher, M.R., and Bowen and Lopes, L.JJ.) held that an infant cannot give a valid bill of exchange or promissory note, even for necessaries.

LANDLORD AND TENANT—BREACH OF COVENANT NOT TO UNDERLET WITHOUT CONSENT OF LESSOR—FORFEITURE—RELIEF AGAINST FORFEITURE.

In *Barrow* v. *Isaacs* (1891), 1 Q.B. 417, the plaintiff, as lessor, claimed to recover the demised premises from the lessees, on the ground that the latter had forfeited the lease by breach of covenant not to underlet without the lessor's consent. The lease provided that this consent should not be arbitrarily withheld in the case of a respectable and responsible person. The lessees, in forgetfulness of this term in the lease, had underlet to very respectable and responsible parties, but without having asked the lessor's consent; and the Court was of opinion that if it had been asked, it could not have been reasonably withheld. The defendants claimed to be relieved from the forfeiture, but the Court of Appeal (Lord Esher, M.R., and Lopes and Kay, L.JJ.), affirming Day, J., held that the plaintiff was entitled to recover, and that the Court ought no to relieve from the forfeiture. This case is interesting for the exposition which is to be found in the judgment of Kay, J., of the equitable doctrine of mistake as a ground for relief against forfeiture; mere ignorance on the part of the party claiming to be relieved, of facts which he might have known had he used reasonable diligence, does not constitute any ground for relief. He cites the language of the Lord Chancellor in *Earl Beauchamp* v. *Winn*, 6 H.L. 223: "The cases in which equity interferes to set aside contracts are those in which either there has been *mutual* mistake or ignorance in both parties affecting the essence of the contract, or a fact is known to one party and unknown to the other, and there is some fraud or surprise upon the ignorant party"; and the same principle would appear to apply where relief against a forfeiture is claimed on the ground of mistake, except in those cases where the forfeiture is occasioned by the non-payment of rent or a sum of money, or by non-observance of a covenant to insure in a lease; as to which see Ont. Jud. Act, s. 25.

CHARTER-PARTY—CONSTRUCTION.

The Curfew (1891), p. 131, though a decision on the construction of a charter-party, affords instruction on the law of contract which it may be well to note. By the charter-party in question it was agreed between the plaintiffs (ship-owners) and the defendants (charterers) that the plaintiffs' steamer should proceed to the defendants' sailing berth and there load, "always afloat," a full and complete cargo—lighterage, if any, necessary to enable the steamer to complete loading, to be at defendants' risk and expense. The ship proceeded to the defendants' berth and commenced to load, but though "always afloat" in the dock, yet the state of the tide was such that if she took in her full cargo at the defendants' dock, she would have been unable to get over the sill of the dock, and have been delayed thereby a week. The steamer was, therefore, after being partially loaded at defendants' dock, removed to another dock, and the rest of her cargo was there taken in. The plaintiffs sued for freight, and the defendants counter-claimed for the expense of moving a part of the freight from their dock to that at which the loading was completed; and the Court (Hannen, P., and Butt, J.) decided they were entitled to recover, because the fear of the detention

of the vessel did not justify the plaintiffs' removal of the steamer from the defendants' dock. To use the words of the Court, "It did not render the steamer unable to complete her loading while afloat in the dock; it only rendered the performance of the contract by the plaintiffs more onerous to them by reason of the loss of the use of the vessel during the neap tides."

SHIP—DAMAGE TO CARGO—BILL OF LADING, EXCEPTIONS—PERILS OF THE SEA—NEGLIGENCE OF MASTER—CONDITION AS TO CERTIFICATE OF SURVEYOR—DUNNAGE INSUFFICIENT.

The Cressington (1891), P. 152, was an admiralty action for damages to cargo, brought by the consignee against the shipowner. The charter-party and bill of lading excepted "perils of the sea . . . and other accidents of navigation, even when occasioned by the negligence . . . of the . . . master." The bill of lading also contained the words, "all other conditions as per charter-party," and the latter contained the condition, "Vessel to be properly stowed and dunnaged, and certificate thereof, and of good general condition, draft of water and ventilation to be furnished to charterers from H. H. Watson, surveyor." Under this condition a certificate was furnished by the surveyor, which did not mention specially dunnage, but stated that the vessel "is entitled to full confidence, can carry a dry and perishable cargo." Two points arose in the case. During heavy weather a rivet worked loose and occasioned a leak, which occasioned damage to the cargo. After the weather improved the master negligently omitted to stop the leak; it was nevertheless held that this was a "peril of the sea," and an accident of navigation, and that the negligence of the master in respect of it was covered by the exception. The other point arose from the fact that, owing to the vessel not being properly dunnaged, some of the cargo was damaged by the water in the water-ways. For this damage the defendants were held liable, the certificate of the surveyor not being conclusive.

Notes on Exchanges and Legal Scrap Book.

LEADING QUESTIONS.—Leading questions are such as instruct a witness how to answer on *material points*.

In cross-examination they are allowed. They are not allowed in the examination-in-chief except by leave of the Judge, in case the witness appears to be hostile to the party calling him, or in the interest of the opposite party, or unwilling to give evidence, and a more searching mode of examining him is necessary to elicit the truth.

Questions are objectionable, as leading, not only when they directly suggest the answer which is desired, but also when they embody a material fact, and admit of an answer by a simple negative or affirmative, though neither the one nor the other is directly suggested. In this case, as well as those where direct leading questions are put, the evidence, so drawn from the witness, is not his

genuine unassisted testimony, but a statement artfully contrived, shaped and colored by professional skill, with a complete knowledge of the facts which the party seeks to establish.

Questions which are intended merely as introductory, and which, whether answered in the affirmative or in the negative, would not be conclusive in any of the points in the case, are not liable to the objection of leading. If it were not allowed to approach the points in issue by such questions, the examination of witnesses would run to an immoderate length. For example, if two defendants are charged as partners, a witness may be properly asked such a question as this: whether the one defendant has interfered in the business of the other?

Although leading questions are permitted in the cross-examination of a witness, yet, even in cross-examination, while you may lead the witness to bring him directly to the point upon which he has to answer, you cannot go the length of putting into the witness's mouth the very words which he is to echo back again.

On the other hand, when an omission is caused by want of memory, a suggestion may be permitted to assist it, even on the examination-in-chief. Thus when a witness stated that he could not recollect the names of the members of a firm, but thought he might possibly recognise them if suggested, this was permitted to be done. So, for the purpose of identification, the witness may be directed to look at a particular person, and say whether he is the man. So, where a witness is called to contradict another respecting the contents of a lost letter, and cannot, off-hand, recollect all its contents, the particular passage may be suggested to him, at least after his unaided memory has been exhausted. So, where a witness is called to contradict another, who has denied having used certain expressions, counsel are sometimes permitted to ask whether the particular words denied were not in fact uttered. Again, the Court will sometimes allow a pointed or leading question to be put to a witness of tender years, whose attention cannot otherwise be called to the matter under investigation. There are other cases in which some suggestion may be allowed to be given to a witness, as, where he is called to prove a delivery of goods, consisting of various items, or delivered at various times. Such cases evidently do not fall within the principle which prohibits leading questions. And it must always be remembered that the Judge has a discretionary power of relaxing the general rule, under any circumstances, and to whatever extent he may think fit, so far as the purposes of justice require. On the other hand, under a rule of the Supreme Court, first made in 1883 (Q. 36, r. 37), the Judge may now, in all cases, disallow any questions put in cross-examination of any party or other witness which may appear to him to be vexatious and not relevant to any matter proper to be inquired into in the cause or matter. There is no distinction recognised by the law between questions which are, and questions which are not, leading. To object to a question as leading is only another mode of saying that the examination is being conducted unfairly. It is entirely a question for the Judge whether or not the examination is being fairly conducted. The objections to leading questions do not by any means apply with equal force to all witnesses or to all parts of an

inquiry. Some witnesses will adopt anything that is put to them, whilst others scrupulously weigh every answer. Moreover, innumerable questions are put for a merely formal purpose, the facts not really being in dispute, or simply in order to lead the mind of the witness to the real point of inquiry. As a great saving of time is effected by leading a witness, it would be extremely undesirable to stop it where it is otherwise unobjectionable. A question is objectionable as leading when it suggests the *answer*, not when it merely directs the attention of the witness to the *subject* respecting which he is questioned. It should never be forgotten that "leading" is a relative, not an absolute term. There is no such thing as "leading" in the abstract. The identical words which would be leading of the grossest kind in one case or state of facts, would be not only unobjectionable, but the very fittest mode of interrogation in another. On all matters which are merely introductory, and form no part of the substance of the inquiry, it is both allowable and proper for a party to lead his own witnesses, as otherwise much time would be wasted to no purpose; and although the not leading one's own witness when allowable is by no means so bad a fault as leading improperly, still it is a fault; for it wastes the time of the Court, has a tendency to confuse the witness, and betrays a want of expertness in the advocate.

Very unfounded objections are constantly taken on the ground that the questions objected to are leading questions. Lord Ellenborough, in a reported case, said: "I wish that objections to questions as leading might be a little better considered before they are made. It is necessary, to a certain extent, to lead the mind of the witness to the subject of inquiry. If questions are asked, to which the answer 'Yes' or 'No' would be conclusive, they would certainly be objectionable, but in general no objections are more frivolous than those which are made to questions as leading ones." (*Nicholls* v. *Dowding*, 1 Stark. 81.) What Lord Ellenborough thus said in 1815 is equally true in 1891.—*Law Gazette.*

EVADING THE LAW.—Queen Elizabeth, in one of her trenchant speeches, roundly rated the lawyers for standing more upon form than matter, more upon syllables than the sense of the law. Had the subjects of the royal censure dared to answer her outspoken Majesty, they might have retorted that all manner of men, if it suited their interest, were apt to do the like, and hold by the letter rather than the spirit. When Pope Innocent put England under an interdict, condemning its fertile fields to barrenness, the people might have starved but for some beneficent hair-splitters opportunely discovering that the interdict could only affect land under tillage at the time of its imposition, and therefore that crops might be raised upon the waste lands, commons, and fields hitherto unploughed. Necessity begets casuistry. The old knight whose sacrilegious deeds earned him many an unheeded anathema, as he lay waiting the coming of death, remembered that he was an excommunicated man, sentenced to be damned, whether buried within the church or without the church. Although the contumacious reprobate had never found himself much the worse for ecclesiastical

curses, he thought it advisable to be on the safe side; so, directing his body to be buried neither within the church nor without the church, but in a hole cut in the outer wall, he died in that happy conviction.

Once upon a time the governor of a city issued an order of the night, commanding every person walking about after dark to carry a lantern. Sundry citizens were arrested for non-obedience, whereupon they produced their lanterns, and being asked what had become of the candles, replied that they were not aware that candles were required. An amended order now appeared; but night-strollers wandered about as much in the dark as before, and it was not until he commanded the candles to be lighted ones that the governor got things done to his mind. In 1418 a civil proclamation was issued in London, directing that every honest person dwelling within the city limits should hang out "a lantern with a candle in it, to burn so long as it might endure;" from which it might be inferred that the Londoners had hitherto lit their candles only to blow them out again, so that they were quite capable of poking fun at the authorities. Indeed, the latter would seem to have been inclined to jocularity themselves, humorously insisting only upon honest folk lighting up—a limitation calculated, however, to insure a general illumination.

There was sense as well as humor in the defence made by the precise Parisian charged with allowing his dog to be at large without a muzzle: "The regulations do not say where the muzzle is to be put, and thinking my dog would like to be able to breathe a little fresh air, I put the muzzle on his tail!" A similar omission in an English Act requiring owners of common stage-carts to have their names painted upon them, led to the object of the law being defeated in various odd ways. Some painted the name where no one could see it, others scattered it all over the cart, a letter on a panel, and one ingenious fellow's vehicle bore the inscription, "A most odd act on a stage-cart"—a clever anagrammatic arrangement of "Amos Todd, Acton, a stage-cart."

Shrewd folks have sometimes managed to get the weather-gauge of the law, by simply shifting the responsibility. When abducting an heiress was a criminal offence, gentlemen taking a trip over the border with a well-dowered damsel were careful to make it appear the lady was the abductor. Upon the happy pair reaching Carlisle, the post-horses for the last stage were ordered by the bride expectant, her companion becoming *non est* for the moment; and the goal attained, the lady paid the postilions, sent for the forger of the matrimonial bonds, and when he had done his office, satisfied his demands out of her own purse. A female toll-taker, sued by the turnpike trustees for money she held belonging to them, and ordered to pay up, induced a travelling tinker to make her his wife, and when summoned for contempt produced her marriage certificate, and pleaded that the trustees must look to her husband for payment of the debt, owning, at the same time, that she did not know, or want to know, what had become of him.

The truth of the saying, "Where there's a will, there's a way," was exemplified in a comical way by a tramp who was refused a night's lodging at a police-station in Maine, the officer on duty explaining, "We only lodge prisoners;

you've got to steal something, or assault somebody, or something of that kind." "Oh, I've got to assault somebody, have I?" remarked the vagabond, and knocked one of the police-officers off his stool; and when the astonished victim had picked himself up, quietly said, "Give me as good a bed as you can, mister, 'cause I don't feel very well to-night."

Shortly after the revision of the United States tariff, resulting in the imposition of heavy duty upon lead, and the freeing of imported works of art from taxation, twenty-four grotesque-looking leaden effigies of Lord Brougham were to be seen, standing all in a row on one of the wharfs in New York. They had been consigned to a merchant by an English firm as works of art—a description the custom-house officials refused to indorse, insisting that they were mere blocks of lead. The question was referred to the lawyers; and when, after three months' consideration, the courts pronounced in favor of their artistic origin, collectors of curiosities bought the hideous statues at prices far beyond their metallic value to preserve them in remembrance of the Britishers having for once proved too cunning for their cousins.

Experience teaches that legislation running counter to public opinion is so much legislation wasted. Wherever the Maine Liquor Law has been established, successful tactics have been resorted to to evade it. A traveller in Colorado wishing to get some whiskey as an antidote against possible snake-bites, not a drop was to be had; but he was told he would find spirits of ammonia, to be obtained at any drug store, quite as efficacious. Determined to be prepared for any amount of snake-poison, he had his quart flask filled, as advised; and tasting it out of curiosity, declared, if he had not known better, he could have sworn it was Bourbon whiskey.

Mr. Ward's kangaroo was not such a profitable "cuss" to him as the half-starved wolf, constituting the entire menagerie of a travelling showman, owning not else, save a dirty tent and a mysterious-looking keg. Upon arriving at a likely "pitch," the showman announced that the wolf was on view at the charge of six cents a head. After one or two sight-seers had seen what was to be seen patrons poured rapidly in, to come out wiping their lips, apparently satisfied with having had their money's worth. One man developed an unsuspected interest in natural history, looking in eight times in the course of an afternoon; then he made a start homeward, but after going a few steps, stopped, turned over his pockets, turned round, walked back to the tent, and as he paid the entrance fee, stuttered out, "I b—b—lieve I'll take another look at that wolf!"

Yankee smartness has been displayed in evading other laws, besides that especially admired by the advocates of permissive prohibition. The suppression of the game of ninepins was met by the invention of tenpins. When the selling of clocks by travelling traders was forbidden in Alabama, the Yankee clock-makers let them on lease for nine hundred and ninety-nine years. Ordered to close their bars at midnight, the San Francisco liquor-sellers shut their doors as the clock struck twelve, and opened them five minutes later for the next day's business.—*All the Year Round.*

SOME EARLY BREACH OF PROMISE CASES.—There are among the Early Chancery Proceedings, formerly in the Tower of London, a considerable number of Bills of Complaint, grounded on an alleged breach of promise, or rather breach of *contract*, of marriage, some of which date back as far as the middle of the fifteenth century. At that period, and indeed till the passing of the Marriage Act of 26 George II., the solemnization of matrimony, according to the laws of Holy Church, appears to have been altogether subsidiary to the civil contracts, or espousals, which often preceded the actual marriage by a considerable period. A pre-contract of this kind was, to the thirty-second year of Henry VIII., and again after 2 and 3 Edward VI., considered an impediment to marry with any other person; and until the statute of 26 George II., above referred to, a suit might be brought in the Ecclesiastical Courts to compel a marriage in consequence of such contract.

If a formal betrothal of this kind, to be duly committed to writing and attested, were at the present time declared to be the only legal basis on which an action for breach of promise could rest, a great saving of time to the judicial bench would ensue, and the public would be spared the recital of much of the amorous nonsense with which more or less facetious counsel endeavor to influence a sympathetic jury in assessing the amount of damage, from a pecuniary point of view, done to the outraged feelings of many a too seductive or too enterprising damsel. The law reports, would, however, then be deprived of one of their most amusing features; one on which the ordinary newspaper reader seizes with avidity.

That the courts of the fifteenth and sixteenth centuries were not altogether without their sensational trials of a somewhat similar kind, appears from curious records now under review. I have before me copies of four documents, all apparently bearing date between the years 1452 and 1515, which are peculiarly interesting as illustrative of the social life of that period. They show, in fact, that then, as now, amongst a certain class of persons, marriage was regarded principally in the light of a commercial speculation, the bargains made in some of the cases being specified with a minuteness of detail as amusing as it is unromantic. The first of these is a complaint preferred to the Cardinal Archbishop of Canterbury, Chancellor of England, between the years 1452 and 1454, by Margaret Gardyner and Alice Gardyner (presumably her daughter), against one "John Keche, of Yppeswych," who appears to have been in considerable demand amongst the fair sex, as, according to their own statement, the said Margaret and Alice agreed to pay him the sum of twenty-two marks on condition of his taking the said Alice to wife; but the faithless "Keche," after receiving ten marks from the said Margaret and twelve marks from the said Alice, "meyning but craft and discyt," went and took to wife one Joan, the daughter of Thomas Bloys, *to whom he had been previously assured*, "to the gret discyt of the said suppliants and ageyne all good reason and conscience;" and although at divers times required by the said suppliants to refund the twenty-two marks, he persistently refuses so to do; whereupon they pray for a writ directing him to appear before the King in his Chancery, to answer to the premises, which is granted to them accordingly.

The plaintiffs in this suit appear to have regarded the matter purely from a business point of view, for they seek only to recover the money fraudulently obtained from them by the defaulting "Keche," without making any claim for compensation to the lady whose affections had been so cruelly and wantonly disappointed.

In the next instance before us it is the gentleman who is the victim of a too implicit confidence. In this case, the complainant, John Auger, states that he, "of the grett confydence and trust that he bare to one Anne Kent, syngle-woman, entendyng by the mediacion of her friends to have married the said Anne," and upon a full communication and agreement between himself and the said Anne that a marriage should take place between them, "sufferid the same Anne *to come and resort and abide in his house;*" after remaining in which for the space of a month and more, she departed therefrom without the knowledge of the plaintiff, taking with her "dyvers evydences, mynyments, and chartres concernyng the seid house, and also dyvers juells of the value of *iiijli*," of which, "although oftyntimes requyred" by the plaintiff, she refuses to make restitution: wherefore he prays a writ commanding her to appear on a certain day before the King in his Chancery, etc. Here the parties to the suit appear to have discounted the actual marriage by setting up an experimental household immediately after the conclusion of the marriage contract. Apparently some "incompatibility of temper," or perhaps the innate fickleness of the "said Anne," induced her to bring the experiment to an abrupt conclusion; in carrying her resolution into effect, however, she committed the mistake of endeavoring to indemnify herself for the error into which she had fallen, or perhaps to vent her displeasure on her quasi-husband, by carrying off with her all the valuables she could lay her hands on. This the quasi-husband appears to have strongly objected to, although he does not make any sentimental grievance of her desertion, and, so long as he recovered his property, was evidently prepared to consider himself well rid of his bargain.

The complaint of "Maister Walter Leinster, Doctour of Phisik," which follows, discloses a very curious story, and affords a striking example of pertinacity in following up an absconding suitor. The primary motive, however, in this, as in the preceding instances, seems to have been merely the recovery of moneys actually expended, although the lady's distress of mind and the consequent injury to her health form a moderate item in the schedule of expenses incurred by the unlucky doctor. In his bill of complaint, addressed to "The right reverend fader in God, the Archbishop of York and Chancellor of England," the worthy doctor alleges that, one Maister Richard Narborough, Doctor of Law Sivile, in the moneth of May, in the IX. yere of the reigne of the Kyng oure Soveraigne Lord (Edward IV.) att Cambrigge, in the countie of Cambrigge, in the presens of your said oratour" affianced one Lucy Brampton, the daughter-in-lawe of the said plaintiff, to have her to wife, and the said Lucy affianced the said Richard to have him to her husband; immediately after which affiance, the said Richard informed the plaintiff and the said Lucy that he would "depart over the see unto Padowe, there to applie his stodye for the space of *ij* yeres,"

at the end of which time he promised to return to England, and to "espouse the said Lucy according to the law of Holy Chirche," at the same time especially desiring the plaintiff *to maintain the said Lucy and a maidservant to attend upon her*, providing them with meat, drink, and clothing, and all things necessary, until his return from beyond the sea, when he promised faithfully to repay to the plaintiff all the costs and charges which he had incurred in that behalf; to which the plaintiff agreed, "giffying full trust and confidence to the promises of the said Maister Richard." The latter, however, departed to "Padowe," and there and in other places absented himself from England for the space of ten years, "to the full grete hurt and hevynes" both of the plaintiff and the said Lucy, who, together with her maid, was provided by the plaintiff during the whole of that time with meat, drink, clothing, and all other necessaries. After the expiration of the ten years, "Maister Richard" returned to England, and being required by the plaintiff to fulfil the contract of marriage between himself and the said Lucy, and also to reimburse him for the maintenance of her and her maid during his protracted absence, with other "grevous hurtez, costez, and charges" incurred by him, utterly refused to do either, "which is not only to the greate hurte and hevynes of your said besecher, but also to the *greate perell and iopardy of soule of the same Maister Richard;*" which sums of money, with other "reasonable considerations," which ought to be paid to the said plaintiff, are set out in a schedule annexed to the plaintiff's bill.

In the foregoing proceedings it is worthy of remark that the plaintiff, having affianced his daughter-in-law to an eligible suitor, considers himself thereby relieved from the duty of maintaining her to the same extent as if she were already the wife of the defaulting law-student, which in effect she was. Unjustifiable as the defendant's conduct seems to have been, the claim for damages to the unfortunate Lucy, as appears by an item in the schedule, represents only the sum actually expended on her in consequence of "hir sore and gret sekenes" caused by his "onkyndnes and chaungeablenes," and makes no pretence to compensation for her shattered hopes and wounded feelings, which in a modern suit of this kind would have been assessed at no inconsiderable figure.

In the fourth of these curious actions, the date of which appears to have been between the years 1504 and 1515, the gentleman is again the plaintiff, and seems, according to his own statement, like the defaulting swain first referred to, to have been considerably sought after; both the lady's father and her uncle having used "gret instaunce and labor" to induce him to take her to his affections, although they seem, for some unexplained reason, to have afterwards changed their minds; not, however, before the plaintiff had bestowed on the chosen lady many tokens of affection, which, matter-of-fact man that he is, he now seeks to recover, *together with his expenses in going to visit her.*

The plaintiff in this case, one John James, who appears, curiously enough, to have also been a "law-student," alleges that one Thomas Morgan, of Northampton, scribe there to the Commissary of the Bishop of Lincoln, and Robert Morgan, his brother, "instantly labored your said besecher to take to wyfe one Elizabeth Morgan, daughter to the said Robert Morgan, with whom your said

besecher *suld have in hand by ther promes* 100 *marks in redy money*," upon which "*promes, gret instaunce and labor*," made to him by the defendants, the plaintiff "resorted to the said Elizabeth to his gret costs and charges." And "thorow and desaveabull comforde as well as of the said Thomas and Robert Morgan as of the said Elizabeth," delivered to her many tokens—namely, "a ryng of gold set with certen stones lyke to a dragone's hede;" "a ryng of gold called a serjeaunt's ryng;" "a crosse of gold with a crucyfyx;" "a ryall in gold;" "a nobull in gold;" "thre pomaunders;" "a rebon of sylke;" "a pyncase of cloth of gold;" with other many small tokens to the value of ten marks and more; "and also was at *gret costs and charges thorow his manyfold journeys taken in that behalf;*" which he estimates at other ten marks. But now the said Thomas and Robert have "by ther crafty and falce meane" caused the said Elizabeth to take to husband one John Maurice, since which time the plaintiff hath many times demanded his said tokens, *with his costs and charges*, as well of the said Robert and Thomas, as of the said Elizabeth, which "they and every of them at all times hath denayed and yit doth denay, contrary to right and good conscience," and therefore he prays a writ, etc.

From the documents above quoted, which are fair specimens of a tolerably numerous class, the action for breach of promise of marriage as we understand it at the present day—that is to say, an action seeking substantial damages as the result of a favorable verdict, appears to have been almost unknown to our ancestors. The specific fulfilment of a contract, formally entered into at the betrothal, might, however, as has been stated, be compelled in certain cases by an appeal to the Ecclesiastical Courts.—*The Antiquary.*

Reviews and Notices of Books.

A Manual on the Taxation of Costs in the High Court of Justice, with chapters on costs in alimony actions, and costs in interpleader proceedings. By Charles Howard Widdifield, of Osgoode Hall, Barrister-at-Law. Toronto: Carswell & Co., 1891.

The author has, in 132 pages, grouped most of the Ontario and many of the English decisions affecting the costs properly allowable on taxation. The work is a digest of the decisions merely, without any reference to the *ratio decidendi*, which would have been impossible in a book of such small compass; but the decisions are succinctly quoted and carefully collated from the reports, and each is given under the various headings applicable to it, facilitating a reference to any point. The chapter on costs in interpleader will be found especially useful, embodying, as it does, all the more important decisions.

Reports of the Exchequer Court of Canada. Reported by Charles Morse, LL B., Barrister-at-Law, and published under authority by L. A. Audette, LL.B., Advocate, Registrar of the Court.

Volume I., which is now published, contains all the leading unreported cases from the foundation of the court in the year 1875, up to October 1887, and also an appendix of all Exchequer cases previously reported in the reports of the Supreme Court.

Part 1 of the second volume is also now ready. In it will be found the leading cases decided since October, 1887, and also such general orders regulating the practice of the court as have been made since that date. The price of each volume is $4.00, and the reports will be sent (post-paid) direct.

The British versus The American System of National Government. By A. H. F. Lefroy, M.A. (Oxon), Barrister-at-Law. Toronto: Williamson & Co., Publishers, 1891.

We have perused with great pleasure this pamphlet, which is a re-publication of a paper read before the Toronto Branch of the Imperial Federation League last December. The author expresses very clearly his own views in favor of the British system, quoting largely from the standard constitutional writers on both sides of the question.

His object, as he states, is to concentrate attention on the different relations which exist between the President and Secretaries of State on the one hand, and the Premier and the members of the Cabinet on the other. The consequences of the difference of the two systems are far-reaching, and it is well that all those who take an interest in the future of this country should thoroughly understand the different systems and the respective inevitable results flowing from their administration.

It certainly seems strange, as is the fact, that in monarchial England there is vastly greater freedom of discussion and greater scope for the expression of the will of the people than there is in the Republic of the United States.

A perusal of Mr. Lefroy's admirable pamphlet should convince any unprejudiced person "how foolish should we be if we ever allowed the good ship Canada to forsake that noble British squadron that, led by the flagship of Old England, passes down the stream of history under the Union Jack. Very foolish should we be if we ever allowed any inducements to draw this country away from the broad current of British liberty and progressive development."

We strongly urge our readers to procure this pamphlet from the publishers and see the argument for themselves. The price is only 25c.

The recent lawless event in New Orleans indicates very clearly that we have little to learn from our neighbors either in the way of government theoretically, or its administration practically, and much would be lost by joining them.

A Treatise on Extradition and Interstate Rendition, with Appendices containing the Treaties and Statutes relating to Extradition; the Treaties relating to the Desertion of Seamen; and the Statutes, Rules of Practice, and Forms in force in the several States and Territories relating to Interstate Rendition. By John Bassett Moore, Third Assistant Secretary of State of the United States. Author of a work on "Extra-Territorial Crime," etc. In two volumes. Boston: The Boston Book Company, 1891.

In a carefully prepared, exhaustive, and yet compendious work, although of fifteen hundred pages, the author presents to us the law of extradition in all its phases. The official position of the author has enabled him to have access to state papers and original documents denied to other writers, no matter how painstaking they may be. Apart from this the index of publications cited shows how exhaustive his researches have been. The work of Dr. S. T. Spear, published some thirteen years ago, has not the same practical value as the work before us, which aims at being, before everything, a practical exposition of, and guide to the law. Throughout the volumes will be found in their proper place the suitable and necessary forms, ignorance of which has so often defeated justice.

We cannot, however, but be more especially interested in the seventy pages which the author devotes to the extradition law of Canada, looking upon it first from an historical point of view, and then tracing the law from the period when no treaty existed to the present time. Some useful pages on practice follow, to which are appended the more important decisions, illustrating the question of evidence. The subject of forgery, and the important cases bearing thereon, are specially noted. Our Inter-Provincial Law is also referred to briefly. These pages alone will make the book invaluable to all who require a knowledge of the law in the ever-increasing field of extradition. The method, scientific and explanatory, by which each important case is criticised and analysed, and where leading principles have been misapplied the true principle is distinguished, gives an intrinsic merit to the book apart from its great practical value.

The second volume is devoted to Interstate Rendition, which term the author applies to what is generally known by the inconvenient and unsuitable term of Interstate Extradition, on which the author says, "Law writers have been led to consult the principles of international law, and to apply them to a subject which they do not govern. The transfer of an accused person from one part of a country to another, having a common supreme government, does not bring into operation the principles of international law." In a word, we feel that Mr. Moore's book will be the standard work on this subject for many years to come and that it will be long before any other author will have the courage to face the amount of research required in the production of the volume before us.

Correspondence.

UNLICENSED CONVEYANCERS.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—Herewith I send you three advertisements, clipped from the issue of the *Ridgetown Plaindealer* of the 5th inst., which will speak for themselves, and I ask you to give them publicity in your valuable paper. As a lover of my chosen profession, I deem it a duty I owe to my professional brethren in particular, and to the public generally, to show them, as far as I can, the encroachments that are being made upon legal practice, and the audacity that is being acquired by the horde of unlicensed conveyancers with which this province has become infested, who pay no fees and are wholly irresponsible.

We, the younger practitioners in the smaller towns and villages, are prejudicially affected by the business done by the class of men in question to a far greater extent than are our professional brethren elsewhere; but every member of the profession, wherever he carries on his practice, has just cause for complaint. It is a fact that in this western peninsula those branches of the profession on which the young practitioner, without means or influence, is dependent to give him a start in his professional career (I refer to conveyancing, collection of debts, non-contentions, Surrogate Court work, Division Court practice, etc.), are almost wholly monopolized by the unlicensed conveyancer. I think it high time that the legal profession in this province be accorded at least that degree of protection that the members of every other profession at present enjoy.

I might add that as solicitors and members of the Law Society we cannot, and I am happy to say have no desire to, advertise in such a way as to compete with the class of men in question, but if we sever our connection with the Law Society it seems we can do as we like.

I am, yours, etc., FAIR PLAY.

[See comments on p. 163.—ED. L.J.]

EXTRA-JUDICIAL OATHS.

To the Editor of THE CANADA LAW JOURNAL:

DEAR SIR,—It does not seem to have been generally noticed by the profession that at the last session of the Dominion Parliament an Act was passed amending the "Act respecting Extra-judicial Oaths." Theretofore, the right of commissioners to take statutory declarations had been disputed, but this sets the matter finally at rest. An Act passed by the Ontario Legislature at its last session

was thought by some to give commissioners powers which they now possess under the Dominion Act. In a letter to your journal last May, I stated what seemed to be the effect of the Ontario Statute, namely that it enabled commissioners to take declarations under the various provincial statutes in force; but not to take declarations under the "Act respecting Extra-judicial Oaths." At the time of writing that letter, the Dominion Statute, above referred to, had been passed, so that it was not necessary to construe the Ontario Act to affect any declarations but those taken under Ontario Statutes.

It is noticeable that the amendment to the "Extra-judicial Oaths Act," contained in 53 Victoria, cap. 37, entitled, "An Act further to amend the Criminal Law," omits notaries public from the list of those authorized to take statutory declarations. The wording of the amending section (s. 41) reads: "Any Judge, Justice of the Peace, Police or Stipendary Magistrate, Recorder, Commissioner authorized to take affidavits to be used either in Provincial or Dominion Courts, or any other functionary authorized by law to administer an oath in any matter, may receive the solemn declaration," etc. The words "or any other functionary authorized by law to administer an oath" occurred in the statute as it stood before it was amended, and were held not to include a commissioner for taking affidavits.

Although it may be contended that inasmuch as a notary's powers are wider than those of a commissioner, the former is by implication included in the list of those who are authorized to take statutory declarations; still it seems by no means clear that a notary public may now take a statutory declaration. The amending section, then, ought itself to be amended by inserting "public notary" after "Justice of the Peace" in the first line.

J. E. J.

Toronto, March 12th, 1891.

DIARY FOR APRIL.

1. Wed.....Prince Bismarck born, 1815.
5. Sun.....*1st Sunday after Easter.* Canada discovered, 1499.
6. Mon.....County Ct. Sittings for Motions. Supreme Ct. Sittings.
7. Tues.....County Ct. Non-Jury Sittings, except in York. Great fire in Toronto, 1847.
8. Wed.....Hudson Bay Co. founded, 1692.
12. Sun.....*2nd Sunday after Easter.*
13. Mon.....County Court Non-Jury Sittings in York.
14. Tues.....Princess Beatrice born, 1857.
15. Wed.....President Lincoln assassinated, 1865.
17. Fri.....Ben. Franklin died, 1790.
18. Sat.....First Newspaper in America. 1704.
19. Sun.....*3rd Sunday after Easter.*
20. Mon.....Last day for Call and Admission notices.
23. Thur.....St. George's Day.
24. Fri. .....Earl Cathcart Governor-General, 1846.
25. Sun.....St. Mark.
26. Sun..... *4th Sunday after Easter.*
27. Mon.....Toronto captured (Battle of York), 1813.

Reports.

ONTARIO.

FIRST DIVISION COURT OF THE COUNTY OF ONTARIO.

[Reported for THE CANADA LAW JOURNAL.]

LUKE *v.* KERR AND THE MUNICIPALITY OF EAST WHITBY.

R.S.O., chs. 157, 175, 176, 193, and 237—Cemeteries and burial grounds—Assessment therefor.

The lands of a Cemetery Company, incorporated under the Joint Stock Companies' Letters Patent Act, R.S.O., c. 157, not actually laid out in plots or in use for burial purposes, but leased or used as farming lands, are not exempt from local taxation, either under the Cemeteries' Act (R.S.O., c. 175), or the Cemeteries' Letters Patent Act (R.S.O., c. 176), or under the Assessment Act (R.S.O., c. 193, ss. 3, s. 7)

Semble, that the words "burying ground" in the latter sections apply to a site for a burial ground acquired under R.S.O., c. 237, "respecting the property of religious institutions" and cognate Acts.

Held, also, that the Company in question, having elected to become incorporated as a trading or commercial company, is affected with all the incidents attached thereto, including taxation for local purposes.

Distinctions between "cemeteries" and "churchyard or burial ground" pointed out and discussed.

[Whitby, February 17. 1891.

The plaintiff is the sexton and caretaker of the Ontario Union Cemetery Co., incorporated under the Joint Stock Companies' Letters Patent Act, (R.S.O., 157). The Letters Patent of incorporation are dated February 23rd, 1875.

The plaintiff's father was subsequently appointed the caretaker and sexton of the cemetery, and on his death his son succeeded in his position and duties. No written document or resolution appears to have existed, but the sexton's duties appear to have been confined to keeping the grounds and graves in decent order, dig graves, or attend funerals when required, and perform such other functions appertaining to his position as might be designated by the Managing Committee. He was paid no salary, but was entitled to receive for his own use the burial fees (other than the cost of the plot), and any other perquisites derived from the care of graves. He was also allowed the privilege of cutting the hay off the seventeen acres out of the twenty-five acres of which the cemetery consists, not laid out or used for burials, paying the company $40 per year therefor.

Of late years the plaintiff broke up these seventeen acres and cropped them like any farm lands. The assessor of the corporation assessed the plaintiff in 1889 for the first time, and the taxes for that year were paid under protest by the Cemetery Company. He was again assessed for 1890, and, refusing to pay, the collector, the defendant Kerr, seized for the amount of the taxes and costs amounting to $6.58. The plaintiff thereupon brought this action for illegal seizure. It was also admitted that he appealed to the Court of Revision, but, not appearing thereat, the appeal was dismissed.

The real plaintiffs, the Ontario Union Cemetery Company, claimed that under sec. 13 of R.S.O., c. 175, these lands assessed are exempt from taxation.

The defendants contended that they are not so exempt, on the ground that the company, by leasing or otherwise parting with the temporary use of the lands for burial purposes, at once became liable to assessment for, and payment of, taxes; and that, in any event, the matter was *res judicata* by the Court of Revision.

The reply to the first objection was that the use of the land at a reduced or nominal rent was really part of the plaintiff's remuneration; and to the second, that the lands being totally exempt from taxation under sec. 13 of R.S.O., 175, the Court of Revision had no jurisdiction; under the authority of *Rowse* v. *G.W. Ry. Co.*, 15 Q.B 168., and *Nickle* v. *Douglas*, 37 Q.B. 67.

C. A. Jones, Oshawa, for the plaintiff.

J. E. Farewell, Q.C, Whitby, for the defendants.

DARTNELL, JJ. At the date of the plaintiff's incorporation by Letters Patent, there was only one way of obtaining incorporation of a cemetery company as such, viz., by R.S.O. (1887), c. 175, formerly R.S.O. (1877), c. 170, again derived from C.S.U.C., c. 67. The statute enabling cemetery companies under that name and for burial purposes to become incorporated by Letters Patent (R.S.O., c. 176, formerly 43 Vict., c. 23) was not passed until after the organization of the real plaintiffs herein.

It cannot be contended that the Joint Stock Companies' Letters Patent Act, under which they derive their corporate existence, contains any provisions exempting any property of such Company from taxation.

I cannot find any authority, statutory or otherwise, incorporating the provisions of R.S.O., 175 or 176, into the charter of any Company organized under the "Joint Stock Companies' Act." The real plaintiffs could have become incorporated under the Cemetery Act existing at the date of their incorporation, and would then be entitled to claim the exemption from taxation they now put forward; but by choosing another form of corporate existence and acquiring the privilege of a commercial rather than a benevolent body, I conceive that they cannot be heard to claim the benefit of an Act whose provisions they either practically abnegated, or at least declined to take advantage of. It is an inference fairly to be deduced, that, having elected to become incorporated in the way they did, this Company have expressly renounced any privileges incident to the Cemeteries' Act, and subjected themselves to all the obligations of a Joint Stock Company, including taxation.

The judgment will be for the defendants. There will be no costs, provided the amount claimed by the defendants be paid forthwith, otherwise judgment for the defendants with costs.

After handing out the above judgment, I was asked to take into consideration the further contention on the plaintiff's part, that even if the Company's cemetery be one incorporated under either ch. 175 or 176, R.S.O., the words of ss. 3 of s. 6 of the Assessment Act, R.S.O., c. 193, are broad enough to exempt their lands from taxation. This sub-section reads, "Every place of worship and land used in connection therewith, churchyard and burial ground."

Upon this Chief Justice Harrison makes the following comments: "Whether the exemption extends to all burying-grounds, or only those used in connection with the place of worship, is a question not yet determined." *Harrison Mun. Man. p. 714 (5th ed.).*

It will be seen that the question is now to be considered without reference to any authority, and must be decided on reasoning and analogy. The Act respecting the Property of Religious Institutions, R.S.O., c. 237, and also the various Acts respecting the Church of England in Canada, empowers any religious society or congregation to acquire, among other things, "a site for a burial ground." Probably it was the burial grounds acquired under these Acts that the Legislature had in view when providing for the class of exceptions set out in the sub-section quoted.

The word "cemetery" is of Greek derivation, signifying "a sleeping place," and was adopted by the early Christians as the name for the place of burial for their dead. These places were always extra-mural. The custom of using the church or churchyard as places of sepulture did not begin to prevail until the seventh or eighth century of the Christian era. The difference between a cemetery and a churchyard or burial ground appears to be that in the latter a grave or burial plot cannot be obtained in perpetuity, while in the former it can. The freehold is vested in the vicar or rector. The distinction is thus expressed in Wharton's Legal Lexicon: "A cemetery differs from a churchyard by its locality and incidents; by its locality as it is separate and apart from any sacred building, used for the performance of divine service; by its incidents, that inasmuch as no vault or burying-place in an ordinary churchyard can be purchased for a perpetuity—in a cemetery, or permanent burying-place, it can be obtained."

Under the Cemeteries' Acts, R.S.O., c. 175, a Company incorporated under its provisions is specially exempt from taxes.

It is unaffected by the Registry laws and cannot be sold or mortgaged or become liable to any judgment or execution, and in fact their lands are dedicated in perpetuity to burial purposes.

In this case the Company, being a mere commercial corporation, I submit could sell or mortgage such portions of their lands as are not needed for cemetery purposes, and are not laid out or used therefor. Or they might wind up,

and sell the surplus and divide the proceeds among the stockholders.

The charter of the company states explicitly that the land is "to be used exclusively for cemetery purposes." That portion which has been laid out in burial plots, as per plan, has not been assessed. I think that the defendants' contention, that the remaining eighteen acres, when cultivated as a farm and used directly or indirectly as such, and providing remuneration for their sexton or caretaker, is liable to assessment, is a reasonable one, and that it has ceased to be, or rather never became a burial ground, and is liable to municipal taxation. The plaintiff is a tenant, either at will or from year to year. A plot could not be sold or a grave opened in any part of the eighteen acres without his consent. In fact, the land (temporarily, it may be) is withdrawn from use as a burial ground. The managing director of the Company states that it would be willing to allow burial in any part of these eighteen acres, if asked for; but he can only speak for himself, and might be overruled by his co-directors or by a by-law or resolution of his Company.

I think it is a matter for comment, that if the Legislature thought the words of the Assessment Act were broad enough to cover the case of cemeteries, they would not have deemed it necessary to place on record the express exemption given by sec. 13 of R.S.O., c. 175. I give no weight to the objection that the cemetery is unnecessarily extensive. The whole land consists of twenty-five acres, and that is the minimum quantity permitted by R.S.O., c. 176, s. 3. I am of opinion that the eighteen acres was properly assessed, and to the plaintiff as the occupant of land not used for burial purposes, but the contrary; and if this be right, the dismissal of the appeal by the Court of Revision is an effectual bar.

In *Reg.* v. *St. Marys Abbotts*, 12 A. & E., 824, it was held that a cemetery company were liable to be assessed for county rates, not only for the unused portion of their land but even for the burial plots sold, on the ground that they were still occupiers of the land used for burial, their conveyance being only grants of easements in perpetuity. This present Company does not pretend to convey the plots, but only to confer an easement, as appears by their certificates.

Early Notes of Canadian Cases.

SUPREME COURT OF CANADA.

Exchequer Court.] [Dec. 10.

THE QUEEN *v.* MCGREEVY.

Claim for extra and additional work due under Intercolonial Railway contract—31 Vict., c. 13., ss. 16, 17, 18; and 37 Vict., c. 15—Change of chief engineer before final certificate given—Reference of suppliant's claim to said engineer—Report or certificate by chief engineer recommending payment of a certain sum—Effect of—Approval by commissioners or minister necessary.

Upon a claim made by the respondent for the sum of $120,371 as being due to him for extra work, etc., beyond what was included in his contract for building a section of the Intercolonial Railway, and which sum he alleged had been certified to by F.S., as the chief engineer of the Intercolonial Railway, in his final and closing certificate given in accordance with clause 2 of the respondent's contract, a statement of admission was agreed upon by both parties, and the following question was submitted to the Exchequer Court: "Is the suppliant entitled to recover on the report or certificate of F.S.?" The report was never approved of by the Intercolonial Railway Commissioners, or by the Minister of Railways and Canals, and 31 Vict., c. 13, s. 18, enacts: "No money shall be paid to any contractor until the chief engineer shall have certified that the work for, or on account of which, the same shall be claimed has been duly executed, not until such certificate has been approved of by the commissioners."

Held, 1st, per RITCHIE, C.J., and GWYNNE. J., reversing the judgment of the Exchequer Court, that the report of F.S., assuming him to have been the chief engineer to give the final certificate under the contract, cannot be construed to be a certificate of the chief engineer which does or can entitle the contractor to recover any sum as remaining due and payable to him under the terms of his contract, nor can any legal claim whatever against the Government be founded thereon.

2nd, per RITCHIE, C.J., that the contractor was not entitled to be paid anything until the final certificate of the chief engineer was approved of by the commissioners or Minister of Railways and Canals. 31 Vict., c. 13, s. 18, and 37 Vict. c. 15; *Jones* v. *Queen*, 7 Can. S.C.R. 57.

3rd, per PATTERSON, J., that although F.S. way fully appointed chief engineer of the Intercolonial Railway, and that his report on suppliant's claim may be held to be the final and closing certificate to which he was entitled under the 11th clause of the contract, yet as it is provided by the 4th clause of the contract that any allowance for increased work is to be decided by the commissioners, the suppliant is not entitled to recover on F.S.'s certificate.

Per STRONG and TASCHEREAU, JJ. (dissenting), that F.S. was the chief engineer, and as such had power under the 11th clause of the contract to deal with the suppliant's claim, and that his report was "a final and closing certificate" entitling the respondent to the amount found by the Exchequer Court on the case submitted.

Per STRONG, TASCHEREAU, and PATTERSON, JJ., that the office of commissioners having been abolished by 37 Vict., c. 15, and their duties and powers transferred generally to the Minister of Railways and Canals, the approval of the certificate was not a condition precedent to entitle the suppliant to claim the amount awarded to him by the final certificate of the chief engineer.

Appeal allowed with costs.

Robinson, Q.C., and *Hogg*, Q.C., for appellant.

Girouard, Q.C., and *Ferguson*, Q.C., for respondent.

COSSETTE *v.* DUNN ET AL.

Quebec.] [Dec. 9

Appeal—Jurisdiction—Amount in controversy—Supreme and Exchequer Courts Act, s. 29—Mercantile agency—Responsibility for communicating to a subscriber an incorrect report concerning the standing of a person in business—Damages—Discretion of Judge in the court of first instance.

The plaintiff, in an action for $10,000 for damages, obtained a judgment of $2000. The defendant appealed to the Court of Queen's Bench, where the judgment was reduced to $500. The plaintiff appealed to the Supreme Court, and the defendant filed a cross appeal.

Held, that the case was appealable to the Supreme Court, the matter in controversy being the judgment of the Superior Court for $2000, which the plaintiff seeks to have restored. (TASCHEREAU, and PATTERSON, JJ., dissenting.)

Held, also, per RITCHIE, C.J., and FOURNIER and GWYNNE, JJ., 1st, that persons carrying on a mercantile agency are responsible for the damages caused to a person in business by an incorrect report concerning his standing, though the report be only communicated to a subscriber to the agency on his application for information. 2nd, reversing the judgment of the court below, that the amount of damages awarded by the Judge in his discretion in the court of first instance, there being no error or partiality shown, should not have been interfered with by the Court of Appeal. *Levi* v. *Reed*, 6 Can. S.C.R. 482; and *Gingras* v. *Desilets*, Cassels' Digest 117, followed.

Appeal allowed with costs.

Belcourt for appellant.

Lash, Q.C., and *Girouard*, Q.C., for respondents.

RAPHAEL *v.* MCFARLANE.

Shares subscribed for by father "in trust" for minor child—Arts. 297, 298, 299, C.C.

Where the father of a minor, who is not her tutor, invested monies belonging to her in shares of a joint stock company "in trust" and afterwards sold them without complying with the provisions of Arts. 297, 298, 299, C.C., to a person who had perfect knowlege of the trust, but pays full value, a tutor subsequently appointed has the right to recover the value of such shares from the purchaser. TASCHEREAU, J., dissenting. *Sweeny* v. *Bank of Montreal* (12 App. Cas. 617) followed.

Appeal allowed with costs.

MacLennan for appellant.

Geoffrion, Q.C., and *Smith*, for respondent.

[Feb. 26.

CORPORATION OF THE CITY OF SHERBROOKE *v.* MCMANAMY.

Appeal—Validity of by-law—Supreme and Exchequer Courts Act—Ss. 30, 24 (g)—S. 29 (a) and (b)—Constitutional question—When not matter in controversy.

The plaintiff sued the defendants to recover the sum of $150, being the amount of two business taxes, one of $100 as compounders, and the other of $50 as a wholesale dealer under the authority of a municipal by-law. The defendants pleaded that the by-law was illegal and *ultra vires* of the municipal council, and also that the statute 47 Vict., c. 84 (P.Q.), was *ultra vires* of the Legislature of the Province of Quebec. The Superior Court held that both the statute and the by-law were *intra vires*, and condemned the defendant to pay the amount claimed. On an appeal to the Court of Queen's Bench by the defendant (present respondent), the court confirmed the judgment of the Superior Court as regards the validity of the statute, but set aside the tax of $100 as not being authorized. The plaintiff thereupon appealed to the Supreme Court, complaining of that part of the judgment which declares the business tax of $100 invalid. There was no cross appeal. On motion to quash for want of jurisdiction,

Held, that s. 24 (*g*) of the Supreme and Exchequer Courts Act was not applicable, and that as neither parties on the present appeal attacked the constitutionality of the statute 47 Vict., c. 84 (P.Q.), the case was not appealable under s. 29 (*a*) of the Supreme and Exchequer Courts Act. STRONG, J., dissenting.

Appeal quashed with costs.

Brown, Q.C., for the appellant.

Belanger for respondent.

MOLSON *v.* BARNARD.

Appeal—Judgment ordering a petition to quash seizure before judgment to be dealt with at the same time as the merits of the main action not final—Not appealable.

A judgment of the Court of Queen's Bench for Lower Canada (appeal side), reversing a judgment of the Superior Court, quashing on petition a seizure before judgment and ordering that the hearing of the petition contesting the seizure should be proceeded with in the Superior Court at the same time as the hearing of the main action, is not a final judgment appealable to the Supreme Court. STRONG, J., dissenting.

Appeal quashed with costs.

Laflamme, Q.C., for appellant.

Doherty, Q.C., for respondent.

THE ACCIDENT INSURANCE CO. *v.* MCLACHLAN.

Appeal—New trial ordered by Court of Queen's Bench suo motu—Not final judgment—Not appealable—Supreme and Exchequer Courts Act.

In an action tried by a Judge and jury, the judgment of the Superior Court in review dismissed the plaintiff's motion for judgment and granted the defendant's motion to dismiss the action. On appeal to the Court of Queen's Bench, the judgment of the Superior Court was reversed, and the Court set aside the assignment of facts to the jury, and all subsequent proceedings and ordered, *suo motu*, a *venire de novo*, on the ground that the assignment of facts was defective and insufficient, and the answers of the jury were insufficient and contradictory.

On appeal to the Supreme Court,

Held, that the order of the Court of Queen's Bench was not a final judgment, and that the judgment does not come within the exceptions allowing an appeal in certain cases of new trials, and therefore the case is not appealable.

Appeal quashed with costs.

Hatton, Q.C., and *McCarthy*, Q.C., for appellants.

Greenshields, Q.C., and *Abbott*, Q.C., for respondents.

BACHFORD *v.* MCBEAN.

Appeal—Title to land in controversy—Supreme and Exchequer Courts Act, s. 29 (b).

In an action brought before the Superior Court with seizure in recaption under Arts. 857 and 887, C.C.P., and Art. 1624, C.C., the defendant pleaded that he had held the property (valued at over $2000) since the expiration of his lease under some verbal agreement of sale. The judgment appealed from, reversing the judgment of the Court of Review,

Held, that the action ought to have been instituted in the Circuit Court.

On appeal to the Supreme Court,

Held, that as the case was originally instituted in the Superior Court, and that upon the face of the proceedings the right to the possession and property of an immovable property is involved an appeal lies. Supreme and Exchequer Courts Acts, s. 29 (*b*), and ss. 28 and 24. STRONG, J., dissenting.

Motion to quash dismissed with costs.

Archibald, Q.C., for appellent.

Duclos for respondent.

LANGEVIN *v.* THE SCHOOL COMMISSIONERS OF THE MUNICIPALITY OF ST. MARK.

Mandamus—Judgment on demurrer not final—Appeal—Supreme and Exchequer Courts Act, s. 24 (g)—ss. 28, 29, 30.

A judgment of the Court of Queen's Bench for Lower Canada (Appeal side) reversed an interlocutory judgment of the Superior Court which had maintained the petitioner's demurrer to a certain portion of the respondent's pleas in proceedings for and upon a writ of mandamus.

Held, that interlocutory judgments upon proceedings for or upon a writ of mandamus or habeas corpus are not appealable to the Supreme Court under s. 24 (*g*) of the Supreme and Exchequer Courts Act. The words "the judgment" mean "the final judgment in the case." STRONG and PATTERSON, JJ., dissenting.

Appeal quashed with costs.

Cornellier, Q.C., and *Geoffrion*, Q.C., for respondents.

Lacoste, Q.C., for appellants.

THE ROYAL INSTITUTION FOR THE ADVANCEMENT OF LEARNING, ET AL, *v.* THE SCOTTISH UNION AND NATIONAL INSURANCE COMPANY.

Appeal—Order for new trial—When not appealable—Supreme and Exchequer Courts Act, ss. 24 (g), 30 and 61.

Where a new trial has been ordered upon the ground that the answer given by the jury to one of the questions is insufficient to enable the court to dispose of the interests of the parties on the findings of the jury as a whole, such error is not a final judgment, and cannot be held to come within the exceptions provided for by the Supreme and Exchequer Courts Act in relation to appeals in cases of new trials. See Supreme and Exchequer Courts Act, ss. 24 (*g*), 30, 61.

Appeal quashed with costs.

Doherty, Q.C., and *M. Kavannagh* for respondents.

Trenholme, Q.C., for appellants.

Ontario.] [Dec. 10.

HOBBS *v.* ONTARIO LOAN & DEBENTURE CO.

Mortgage—Re-demise clause—Creation of tenancy — Rent reserved—Tenancy at will—Agreement for lease—Specific performance—Excessive rent—Intention.

A mortgage of real estate provided that the money secured thereby, $20,000 with interest at 7 per cent., should be paid as follows: $500 on December 1st, 1883, and on the first days of June and December in each of the years 1884, 1885, 1886, 1887, and $15,500 on June 1st, 1888. The mortgage contained the following clause:

"And the mortgagees lease to the mortgagor the said lands from the date hereof until the date herein provided for the last payment of any of the moneys hereby secured, undisturbed by the mortgagees or their assigns, he, the mortgagor, paying therefor in every year during the said term, on each and every of the days in the above proviso for redemption appointed for payment of the moneys hereby secured, such rent or sum as equals in amount the amount payable on such days respectively according to the said proviso, without any deduction."

The goods of the mortgagor having been seized under execution the mortgagees claimed payment as landlord, under the said clause, of a year's rent out of the proceeds of the sale of the goods under the Statute of Anne.

Held, that it is competent for mortgagee and mortgagor to create by agreement the relation of landlord and tenant between them.

Held, per STRONG, GWYNNE, and PATTERSON, JJ., affirming the decision of the Court of Appeal (16 Ont. App. R. 225), RITCHIE, C.J., and TASCHEREAU, J., contra, that such relationship did not exist under the re-demise clause of the mortgage in this case the amount purporting to be reserved as rent under such

clause being so largely in excess of the rental value of the premises as to indicate a want of intention in the parties to create such relationship.

Per STRONG, J., that no tenancy at will was created by agreement, but such a tenancy could be held to exist by operation of the Statute of Frauds, the alleged lease being for a period of more than three years and not signed by the mortgagee. The Imperial Statute, 8 & 9 Vict., c. 106, requiring leases for over three years to be made by deed (of which the Ontario Act is a re-enactment) does not repeal the Statute of Frauds, but merely substitutes a deed for the writing required by the latter statute.

Held, per GWYNNE and PATTERSON, JJ., that no tenancy at will, by agreement or otherwise, was created by the re-demise clause.

Held, per STRONG, J., GWYNNE, and PATTERSON, JJ., contra, that the demise clause might be construed as containing an agreement for a lease capable of being enforced in equity and, since the Judicature Act, to be treated by common law courts exercising the functions of Courts of Equity, to be treated as a lease.

Per GWYNNE, J., that the clause could only be regarded as an agreement for the creation of a tenancy in the future if the parties so desired, such agreement to be carried out by the execution of the mortgage by the mortgagees.

Held, per STRONG, GWYNNE, and PATTERSON, JJ., that the demise clause could only be construed as purporting to create a tenancy for the entire term of five years, and it could not be held a good lease for four and a half years, at a rent reserved of $1000 a year, and void for the remaining half year.

Appeal dismissed with costs.

Gibbons for appellants.

Moss, Q.C., for respondents.

MOLSONS BANK *v.* HALTER.

Preference—Defeating or delaying creditors—R.S.O. (1887) c. 124, s. 2—Construction of statute—Effect of words "or which has such effect"—Assignment by trustee to co-trustee—Pressure.

W., a trader, was one of the executors of an estate, and had used the estate funds in his private business; having become insolvent, he gave a second mortgage on certain real estate to his co-executor as security for the money so appropriated. In a suit by a creditor to set aside the mortgage as void under R.S.O. (1887) c. 124, s. 2,

Held, affirming the judgment of the Court of Appeal for Ontario (16 Ont. App. R. 323), PATTERSON, J., dissenting, that the mortgage was not void under the said statute, the co-executor not being a creditor of W. within the meaning of the said section.

2. That the words "or which has such effect," in the section referred to, only apply to the clause immediately preceding, that is, to the case of giving one or more of the creditors of the transferor a preference over others, and do not apply to the case of defeating, delaying, or prejudicing creditors.

3. That the preference mentioned in the statute as avoiding a conveyance must be a voluntary preference, and would not include a conveyance obtained by pressure on the transferer.

Held, per STRONG, J., that W., by misappropriating the funds of the estate of which he was executor, was guilty of a criminal offence, and the fear of penal consequences was sufficient pressure to take from the transaction the character of a voluntary conveyance.

Appeal dismissed with costs.

Bowlby, Q.C., for the appellants.

Aytoun-Finlay and *Du Vernet* for respondents.

PEOPLE'S LOAN CO. *v.* GRANT.

Mortgage—Rate of interest—"Until principal is fully paid and satisfied"—Effect of provision—Rate after principal is due.

G. mortgaged certain real estate to the C. L. Ins. Co., giving certain policies of insurance on his life as collateral security. He afterwards made a declaration under the Ontario statute that the said policies should be payable to his wife, and in case of her dying before him, to his children. After this declaration was made he mortgaged the same property to the P. L. Co., giving the same policies as collateral, and the first mortgage was assigned to the P. L. Co., and was in fact, paid off with the proceeds of the second loan. The mortgage to the P. L. Co. contained a provision that it was to be void on payment at a certain time of the principal and interest thereon at the rate of 10 per cent. per annum "until fully paid and satisfied." In an action to have the assignment of the policies cancelled,

Held, that the P. L. Co. could only hold the policies as collateral security for the mortgage to the C. L. Ins. Co., and not as security for their own mortgage.

Held, further, that the mortgage to the P. L. Co. only carried interest at the rate of 10 per cent. until the principal was payable, and after that date the statutory rate governed.

Rykert v. *St. John* (10 Can. S.C.R. 278) followed.

Appeal dismissed with costs.

Delamere, Q.C., for appellants.

Beck for respondent.

Quebec.] [Dec. 9.

MORIN *v.* THE QUEEN.

Error—Writ of—On what founded—Right of Crown to stand aside jurors when panel of jurors has been gone through—Question of law not reserved at trial—Criminal Procedure Act—R.S.C., c. 174, ss. 164, 256, 266.

Where a panel had been gone through and a full jury had not been obtained, the counsel for the prisoner on the second calling over the jury list objected to the Crown ordering certain jurors to stand aside a second time without cause, and the Judge presiding at the trial did not reserve, or refuse to reserve, the objection, but ordered the jurors to stand aside again, and after conviction and judgment a writ of error was issued.

Held, per TASCHEREAU, GWYNNE and PATTERSON, JJ. (affirming the judgment of the court below), that the question was founded on a question of law arising *on the trial* which could have been reserved under sec. 256 of c. 174, R.S.C., and as the Judge *at the trial* had not reserved, or refused to reserve, the question, the writ of error should be quashed. S. 266, c. 174, R.S.C.

Per RITCHIE, C.J., and STRONG, FOURNIER, and PATTERSON, JJ., that in the present case the Crown could not, without showing cause for challenge, direct a juror to stand aside a second time. S. 164, c. 174, R.S.C. (*Morin* v. *Lacombe*, 13 L.C.J. 259, overruled).

Per TASCHEREAU, J., that the learned Judge at the trial was justified in ruling according to *Morin* v. *Lacombe*, 13 L.C.J. 259, and the jurisprudence of the Province of Quebec.

Per GWYNNE, J., that all the prisoner could complain of was a mere irregularity in procedure, which could not constitute a mis-trial.

Per RITCHIE, C.J., and STRONG and FOURNIER, JJ., that as the question arose *before the trial* commenced it could not have been reserved, and as the error of law appeared on the face of the record, the remedy, by a writ of error was applicable. (See *Brisebois* v. *Queen*, 15 Can. S.C.R. 421.)

Appeal dismissed.

Langelier, Q.C., for appellant.

Dunbar, Q.C., for respondent.

Nova Scotia.] [Nov. 10.

ARCHIBALD *v.* HUBLEY.

Bill of sale—Affidavit of bona fides—Form of jurat—Omission of date and words "before me"—Writ of execution—Signature of prothonotary.

The Nova Scotia Bills of Sale Act, R.S., N.S., 5th ser., c. 92, s. 4, provides that a bill of sale or chattel mortgage shall be void unless accompanied by an affidavit that the same was made in good faith for a debt due to the grantee, etc. By s. 10 the expression "bill of sale" does not include an assignment for the general benefit of creditors. One E. assigned his property to A. in trust, to sell the same and apply the proceeds to the payment of debts due certain named creditors of the assignor. The affidavit accompanying this instrument omitted from the jurat the date of swearing and the words "before me."

Held, reversing the judgment of the Supreme Court of Nova Scotia, GWYNNE, J., dissenting, that this instrument was not an assignment for the general benefit of creditors, and was a bill of sale within the above section of the Act.

Held, also, that the affidavit required by said section must have all the requirements of affidavits used in judicial proceedings. Therefore the omission of the words "before me" from the jurat made the affidavit void and the defect could not be cured by parol evidence in proceedings by an execution creditior of the assignor to have the mortgaged goods taken to satisfy his execution.

Held per GWYNNE, J., that it is only when an affidavit is necessary to give the court jurisdiction to deal with a matter before it that defects of form will invalidate it. In a case like this the affidavit is only an incident in the proceedings and the defect could be cured by evidence.

Held, also, per GWYNNE, J., that an assignment of property absolute in its form and upon trust to sell the property assigned is not affected by said section 4 of the Act, which deals only with bills of sale by way of chattel mortgage.

The goods assigned by E. were seized by the sheriff under an execution, and in an action against the sheriff the execution produced was not signed by the prothonotary of the court out of which it was issued.

Held, that it is the seal of the court which gives validity to such writs and not the signature of the officer, and the want of such signature did not affect the validity of the execution.

Appeal allowed with costs.

W. B. Ross for the appellant.

Eaton, Q.C., for the respondent.

North-West Terr.] [March 11.

MARTIN *v.* MOORE.

Appeal—Jurisdiction—Service of writ out of jurisdiction—Order of Judge—Final judgment—Practice.

A writ of summons, in the ordinary form of writs for service within the jurisdiction, was issued out of the division for the District of Alberta of the Supreme Court of the North-West Territories, and a Judge's order was afterwards obtained for leave to serve it out of the jurisdiction. The writ having been served in England the defendant moved before a Judge of the court below to set aside the service, alleging that the cause of action arose in England and he was, therefore, not subject to the jurisdiction of the courts in the Territories; also, assuming the court had jurisdiction, that the writ was defective, as the practice required that a Judge's order should have been obtained before it issued. The motion was refused, and the decision of the Judge refusing it was affirmed by the full court. The defendant then sought to appeal to the Supreme Court of Canada.

Held, GWYNNE, J., *hesitante*, that the judgment sought to be appealed from was not a final judgment in an action, suit, cause, matter, or other judicial proceeding within the meaning of The Supreme Court Act, and the court had no jurisdiction to hear the appeal.

Appeal quashed with costs.

Chrysler, Q.C., for the appellant.

Moss, Q.C., for the respondent.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

FALCONBRIDGE, J.] [Jan. 16.

IN RE WILSON AND TORONTO INCANDESCENT ELECTRIC LIGHT CO.

Husband and wife—Conveyance to, in 1874—Tenants in common—Devolution of Estates Act—Conveyance of land by administrator—Debts.

Land was conveyed in 1874 to a husband and wife, who were married in 1864,

Held, that they took, not by entireties, but as tenants in common, just like strangers.

Held, also, that the husband could by virtue of the Devolution of Estates Act, as administrator of the wife, and in his own right, make a valid conveyance of the whole of the land, although there were no debts of the wife to pay.

Martin v. *Magee*, 19 O.R. 705, distinguished.

J. A. Paterson for the company.

Beverley Jones for Wm. Wilson.

Div'l Court.] [Feb. 2.

KENT *v.* KENT.

Husband and wife—Conveyance of land to wife directly—Equitable estate in wife—Husband trustee of legal estate—Devise of land by wife to infant children—Possession by husband—Natural guardian—Statute of Limitations.

A conveyance of lands from a husband to his wife directly was made in 1870, was expressed to be in consideration of "respect and of one dollar," was in the usual statutory short form, and was duly registered. The marriage was in 1854.

Held, affirming the decision of BOYD, C., *ante* p. 158, that the conveyance had the effect of conveying the equitable estate in the lands to the wife, leaving the legal estate in the husband as trustee thereof for the wife. A gift from a husband to a wife is not an incomplete gift by reason of the incapacity of the wife at law to take a gift from her husband.

Re Breton's Estate, 17 Ch. D. 416, commented upon.

The wife died in 1872, having made a will leaving her real estate to the two daughters of herself and husband, who were then aged respectively seventeen and twelve. The husband remained in possession during the wife's life, and from her death till his own death in 1890. This action was begun in 1890 by the younger daughter and the son of the elder, to recover possession from the devisee of the husband.

Held, reversing the decision of BOYD, C., that the Real Property Limitation Act did not apply so as to extinguish the rights of the plaintiffs to recover; it was to be presumed that the husband, after conveying to his wife, was in possession of the lands and in receipt of the rents and profits for and on behalf of his wife; and that, upon his wife's death, he entered into possession and receipt for and on behalf of his infant children and as their natural guardian; and, his being so, his possession and receipt were the possession and receipt of his wife, and, after her death, of his children and those claiming under them; and the statute, therefore, never began to run.

Wall v. *Stanwick*, 34 Ch. D. 763; *In re Hobbs*, 36 Ch. D. 553; *Lyell* v. *Kennedy*, 14 App. Cas. 437, followed.

Hickey v. *Stover*, 11 O.R. 106; *Clark* v. *McDonnell*, an unreported decision of the Common Pleas Divisional Court, not followed.

Gibbons, Q.C., for the plaintiffs.

W. R. Meredith, Q.C., for the defendant.

Div'l Court.] [Feb. 2.

TAYLOR *v.* MASSEY.

Defamation—Libel—Resolution passed at meeting—Letter published in newspapers—Accusation of conspiracy—Innuendo—Plaintiff not named—Surrounding circumstances—Excessive damages—Evidence of occurrences at meeting—Admissibility—Privilege.

The plaintiff, who was employed by a manufacturing company of which the defendant was president, brought an action for the seduction of his daughter against the superintendent of the company. Some particulars in regard to the alleged seduction having appeared in public newspapers, a meeting of some of the members and servants of the company was held, at which the defendant presided, and a resolution was passed expressing confidence in the innocence of the superintendent of the alleged seduction. A letter was then or immediately afterwards drawn up and signed by a number of the persons present, including the defendant, handed to a reporter for publication, and was published in several newspapers, without any objection on the defendant's part.

The letter was addressed to the superintendent, referred to the charges against him which had appeared in the newspapers, declared the belief of the signers in his innocence, and concluded, "We believe you are the victim of a conspiracy as base and ungrateful as was ever sprung on an innocent man, and we pledge ourselves to stand by you until your innocence shall have been clearly established, or until—which we are confident will never be—you are shown to be the monster depicted in the public press." The plaintiff was not named in the letter.

The plaintiff sued the defendant for libel in consequence of the publication of this letter. The innuendo was that the plaintiff was guilty of the offence of conspiring and agreeing with his daughter to defame and slander or otherwise injure the reputation and character of the superintendent. The whole question of libel or no libel was left to the jury, who found for the plaintiff with $1,500 damages.

Held, that it was not necessary to decide whether the letter could be construed as supporting the innuendo of a criminal conspiracy: the question really was whether the defendant had libelled the plaintiff, and this question had been determined by the jury.

2. That the surrounding circumstances were admissible in evidence for the purpose of showing that persons conversant with those circumstances might naturally conclude that the plaintiff was the person aimed at by the letter; and it was enough that the circumstances and the libel taken together pointed to some one, and that the jury found the plaintiff to have been the person intended.

3. That the verdict of the jury could not be interfered with on the ground that the damages were excessive.

4. That evidence of what took place at the meeting was admissible as proof that the plaintiff was the person intended by the resolution passed at it, the defendant having been present; and that a witness who was present at the meet-

ing and took notes, which were afterwards printed, could refer to the printed copy, after the destruction of the original notes, to show exactly what did take place.

5. That the occasion was not one of privilege or qualified privilege.

Osler, Q.C., and *Ryckman*, for the defendants.
James A. Macdonald for the plaintiff.

Chancery Division.

Full Court.] [Feb. 18.

BICKERTON v. DAKIN.

Lien—Mechanics' lien—Partnership—Claim of lien registered in name of, after dissolution—R.S.O., c. 126, ss. 16, 19—"Claimant"—"Person entitled to the lien"—53 Vict., c. 37, O.—Jurisdiction of High Court—Joining liens—Statements of claim under 53 Vict., c. 37, s. 2, O.—Amendment.

Judgment of BOYD, C., reported, 20 O.R. 192, affirmed on all points.

Aylesworth, Q.C., for the defendant Nesbitt.
Masten for the plaintiffs.

Full Court.] [Feb. 18.

TOWN OF MEAFORD *v.* LANG ET AL.

Principal and surety—Official bond—Collector of taxes—Municipal corporation—Release of sureties—Non-disclosure—Constructive fraud.

Decision of MACMAHON, J., reported, 20 O.R. 42, affirmed.

W. Cassels, Q.C., for the plaintiff.
J. K. Kerr, Q.C., for the defendants.

Practice.

ROSE, J.] [Feb. 13.

LANGMAN *v.* HUDSON.

Partnership—Defendants sued in firm name—Pleading—Rule 288.

In an action against two partners sued as a firm in the firm name, though after dissolution, one of the partners appeared in his individual name and afterwards delivered a statement of defence and counter-claim, also in his individual name. The other partner did not appear.

By Rule 288, "Where partners are sued in the name of their firm, they shall appear individually in their own names; but all subsequent proceedings shall, nevertheless, continue in the name of the firm."

Held, that the words "subsequent proceedings" should be confined to proceedings by the plaintiff; and a motion to set aside the pleading was dismissed.

H. Cassels for the plaintiff.
W. M. Douglas for the defendant Hudson.

C.P. Div'l Court.]
MACMAHON, J.] [Feb. 14.

MCLEAN *v.* BRUCE.

Attachment of debts—Judgment for costs only—Rule 935—Parties—Assignee of judgment—Amount attached unascertained—Residuary legatee and executor—Administration—Receiver—Equitable execution.

Under Rule 935 an order to attach debts may be founded on a judgment for costs only.

Troutman v. *Fisken*, 13 P.R. 153, distinguished.

Under Rule 935 an assignee of a judgment, though not a party to the action, may apply to enforce the judgment by attachment. An order may be made attaching the amount, if any, coming to a judgment debtor as residuary legatee under a will, although it is undetermined whether anything, and, if anything, how much, is due to him. Upon an inquiry as to whether anything is due to a judgment debtor as residuary legatee, where he also has the character of executor, the legatees and creditors ought to be before the court, and the way to bring them before the court is by administration proceedings.

Quære, whether the assignee of the judgment would be entitled to administration.

The assignee of a judgment appointed receiver by way of equitable execution to receive whatever interest the judgment debtor might have as residuary legatee.

Hoyles, Q.C., for the assignee.
H. Cassels for the judgment debtor.

BOYD, C.] [March 5.

CHAPMAN *v.* NEWELL.

Costs—Partnership action—Assets.

In actions between parties, in the absence of special circumstances such as misconduct or negligence, the assets will be directed to be

applied, first, in payment of creditors ; next, in payment of the sum found due the successful party ; and lastly, in payment of the costs of both parties.

Hainer v. *Giles*, 11 Ch. 942, followed.

The fact of a balance being found due by one partner to the other is no reason for departing from the ordinary rule as to costs.

John Greer for the plaintiff.

Hislop for the defendant.

C.P. Div'l Court.] [March 6.

CAMPBELL *v.* SCOTT.

Discovery—Examination of defendant before statement of claim—Slander— Rule 566.

In actions of slander when the court is satisfied of the *bona fides* of the plaintiff, and is convinced that he cannot state fully and with sufficient particularity his various grounds of complaint, and when the knowledge required is within the possession and control of the defendant, an examination for discovery before statement of claim will be ordered, under Rule 566 ; but in such case a further examination after pleading will not be allowed except upon special grounds.

Fisken v. *Chamberlain*, 9 P.R. 283 ; *Gordon* v. *Phillips*, 11 P.R. 540 ; *McLean* v. *Barber*, 13 P.R. 500, followed.

Aylesworth, Q.C., for the plaintiff.

Shepley, Q.C., for the defendant.

STREET, J.] [March 13.

FLETT *v.* WAY.

Set-off—Rule 375—Rule 1205—Solicitor's lien—Counter-claim.

This was an action brought by a tenant against his landlord (W.), a contractor (S.), who had made alterations in the premises formerly occupied by the tenant, and the agent (L.), who collected the rent, for $1,000 damages for wrongful entry, etc., and was tried by STREET, J., and a jury.

A verdict was rendered on the claim against W. only, for $104 damages, and on W.'s counter-claim against the plaintiff for $104 overdue rent.

The entry of judgment was deferred till this day, when counsel for the defendant W. moved to set off the debt recovered on the counter-claim against the damages recovered on the claim, relying on Consolidated Rule 375. The plaintiff was admitted to be worthless. His counsel contended that Rule 375 must be read with Rule 1205, and was limited by it, and objected that the Court had no jurisdiction to direct a set-off, the effect of which would be to prejudice the lien of the plaintiff's solicitors for costs, and cited the English cases, and also read an affidavit of the plaintiff's solicitor claiming a lien. Counsel for the defendant replied that all the cases referred to as having been decided under Rule 1205 were cases in which a set-off had not been directed, and decided only that in construing a judgment where a set-off had not been directed the same would not be allowed to the prejudice of the solicitor's lien, and cited the dictum of OSLER, J., in *Brown* v. *Nelson*, 11 P.R., at p. 125.

Held, that the damages recovered by the plaintiff be set-off against the debt recovered by the defendant W., and that no execution be issued by either party against the other for such damages or debt.

W. D. McPherson for defendant W. for the motion.

F. E. Titus for the plaintiff, contra.

SIXTH DIVISION COURT, COUNTY OF ONTARIO.

DARTNELL, JJ.] [March 19.

GATTIE *v.* OVEREND.

Poundkeeper—Running at large—R.S.O., c. 215, s. 3.

To justify a sale of animals under a pound by-law, they must be "unlawfully running at large," and also "delivered to the poundkeeper for the purpose of impounding." Where, therefore, two sheep, found in the highway, were driven to the yard of the defendant, who was an innkeeper and also a poundkeeper, on the supposition that they belonged to a cattle-dealer accustomed to use the yard for the purpose of herding, and were, on discovering that they belonged to the plaintiff, held by the defendant as poundkeeper, and subsequently sold

Held, that the animals were not "unlawfully running at large," nor were they "delivered to the poundkeeper for the purpose of impounding" within the meaning of R.S.O., c. 215, s. 3: that they were detained by the defendant in the capacity of a gratuitous bailee and not as a poundkeeper; that the sale was illegal, and, under all the circumstances, that the poundkeeper acted maliciously.

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A VALUED contributor discusses on a subsequent page the question of a substitute for Grand Juries, in view of the article which will be found *ante* p. 4. The appointment of Crown Counsel seems to meet the need, but it may be a question whether the right of appointment should rest with the Province or the Dominion. The functions of the suggested officers are of a semi-judicial character. There should, however, be no difficulty on this score, once it is recognized that the suggested change should be carried into effect.

IN a letter which recently appeared in these columns, a correspondent, referring to the then approaching election of Benchers, took exception to the candidature of a barrister (personally unknown to us), as being unfit for that position. It has been stated to us that the person intended to be referred to in the letter is an esteemed member of the profession in Western Ontario. There must, we think, be some misunderstanding. Coming from the source it did, we did not feel justified in withholding the letter, inasmuch as it would be most undesirable for any one liable to such imputations to hold the honorable position of Bencher. Knowing nothing personally ourselves of this gentleman, we have made enquiry, and the information we have received does not warrant the remarks made in the letter, which certainly would not have appeared in our columns if such information had then been obtainable. We need scarcely say that, if the publication has caused him or his many friends any annoyance, we much regret it.

THE recent election of the thirty benchers of the Law Society has not very materially altered the *personnel* of that body. A strong effort was made to elect members of the Bar who were pledged to assist their brethren in endeavoring to protect the profession against unlicensed conveyancers. The result of this was something, but not very marked. In reference to this subject it is well to understand the difficulty which lies in the way of our obtaining justice from the Legislature, the danger being that the Government might be induced by the pressure of unlicensed conveyancers, who were also members of the House, to deprive the profession of what little advantage they may now possess.

Mr. Meredith has the honour of heading the list, Mr. Moss being next. Mr. Christie, of Ottawa, is the first of those outside of Toronto, closely followed by the popular leader of the Bar at St. Thomas. The new benchers are Messrs. Magee, Strathy, Teetzel, Aylesworth, Watson, Barwick, Douglas, Riddell, and Idington. Those on the previous list and not re-elected are Messrs. McMichael, L. W. Smith, James Beatty, Hector Cameron, Huson W. Murray, J. J. Foy, J. H. Ferguson, T. H. Purdom, and N. Kingsmill. We doubt not that when vacancies

occur, as they do from time to time, some of these whose names have been left off, but who have been in the past hardworking, useful benchers, will be nominated to fill vacancies. Some names not on the list we should have been glad to see there, but there is no name on the list to which exception could be taken, or who is not more or less entitled to the distinction conferred.

The names are as follows: W. R. Meredith, Q.C., Toronto; Chas. Moss, Q.C., Toronto; A. J. Christie, Q.C., Ottawa; Colin McDougall, Q.C., St. Thomas; James Magee, Q.C., London; Donald Guthrie, Q.C., Guelph; B. B. Osler, Q.C., Toronto; Edward Martin, Q.C., Hamilton; Christopher Robinson, Q.C., Toronto; B. M. Britton, Q.C., Kingston; the Hon. A. S. Hardy, Q.C., Brantford; John Hoskin, Q.C., Toronto; the Hon. C. F. Fraser, Q.C., Brockville; H. H. Strathy, Q.C., Barrie; Francis Mackelcan, Q.C., Hamilton; Dalton McCarthy, Q.C., Toronto; John Bell, Q.C., Belleville; G. F. Shepley, Q.C., Toronto; Alexander Bruce, Q.C., Hamilton; J. V. Teetzel, Q.C., Hamilton; A. B. Aylesworth, Q.C., Toronto; G. H. Watson, Q.C., Toronto; Z. A. Lash, Q.C., Toronto; J. K. Kerr, Q.C., Toronto; Walter Barwick, Toronto; Æmilius Irving, Q.C., Toronto; C. H. Ritchie, Q.C., Toronto; Wm. Douglas, Q.C., Chatham; W. R. Riddell, Cobourg; John Idington, Q.C., Stratford.

A CHANGE radical and of importance in regard to the punishment of first offences is about to be introduced into French law. It is in effect the oft-discussed theory of conditional punishment put into practice. When the prisoner is brought up for the first time and convicted, he will be sentenced in the usual way, but the sentence will not necessarily be carried out. If the court should so decide, the execution of the sentence will be delayed, and if the offender keeps a clear record for five years the sentence will lapse. If, however, he should again offend during this period, the old sentence will be revived and a double punishment inflicted. The *Times*, in commenting on it, remarks: "A first offence does not necessarily prove that the offender belongs to what is known as the criminal class. He may have been betrayed into crime under the pressure of special circumstances, or may have given way to sudden temptation by no deliberate choice of his own. To send such a man to gaol may have just the effect which a wise legislature would be most careful to guard against. It may introduce him to a life of crime by the stigma which it puts upon him as a gaol-bird, and by thus making it very difficult for him to earn an honest livelihood at any time afterwards. The new law will work in a direction exactly the opposite. The man who has been let off unpunished, but not unsentenced, will have the strongest possible inducement to keep straight for the future. He will have received a grave warning, and he will know that it will depend upon himself whether the consequences are to end with this. If he has become a criminal, so to say, by accident, the probability is that he will stop short at the first offence." The principle of the intended French system would seem to be the reform of the criminal by preventing his becoming one. Such a method of treatment could not, however, we think, be meted out successfully to certain offences which bear on their face the evidence of a depraved nature, which it would be folly to

imagine could be restrained by a suspended sentence ; neither could it be applied in the case of such crimes as make a man dangerous in the highest degree to society. It will be interesting to note the effect of this system, which, so far as one can foresee, will, if carefully and wisely carried out, tend to the lessening of crime.

CROWN COUNSEL.

(COMMUNICATED.)

In a former issue we discussed the question whether or not Grand Juries are essential in any degree to the due administration of criminal justice, and the conclusion arrived at was that they had outlived their usefulness. We indicated that the duties of the Grand Jury could be better performed and the object sought to be accomplished by the grand inquest more satisfactorily effected by means of a change in the present system of appointing Crown Counsel and by an addition to the duties now devolving upon them. We propose in this article to deal, first, with the question of the mode of appointment of Counsel for the Crown as it stands at present, and, second, to suggest some changes which might place this important factor in the administration of our criminal law on a better footing by giving Crown Counsel the powers requisite to enable them to take the place of Grand Juries.

In dealing with the first branch of the subject, we do not intend to reflect in any way upon the ability or integrity of the gentlemen who are appointed from time to time by the Attorney-General of the Province to conduct Crown business. All who know the Attorney-General, of whatever political stripe they may be, will readily admit that there are few public men as careful, thorough, or conscientious in the administration of the law as Mr. Mowat has proved himself to be, whether as a judge or as the Attorney-General of Ontario. Judging from his long tenure of office and the confidence reposed in him by the electorate for these many years, it can scarcely be denied that the public have grown to regard him as a man to be trusted in small matters as well as great, and his name is taken by the people as a sufficient guarantee that their welfare is safe in his hands. We therefore feel warranted in saying that, as regards the administration of criminal justice, there can be no ground of complaint with reference to the personal efforts of the Attorney-General and his officers ; but, when we come to consider the system itself, we fear we cannot speak so strongly in its favor.

The first great objection to the present mode of appointing Crown Counsel is that it is purely political and of a temporary character only. It is highly desirable that these officers should be permanent and that they should not depend upon the influence of their friends for their retainer. The more permanent we can make our judges and all other Crown officials, the better it will be for all parties concerned in the law and its due enforcement. A man who knows that his position is secure will be more likely to perform his duty in a freer and more independent manner than he whose tenure depends, to some extent at least, on considerations other than the faithful discharge of his official functions. If it is thought a proper thing for judges to hold office for life, subject of course to good behavior, it is equally desirable that officers entrusted with the authority of the Crown, and with power to conduct prosecutions affecting the life

and liberty of the subject, should feel that their future employment was not determined by any circumstance of a political nature or by the possibility of a change of government.

There is also another objection to the appointment of Counsel being of a temporary character. The same Counsel is not, as a rule, assigned to the same court or even the same circuit for two assizes in succession. He therefore finds himself a total stranger to the local surroundings, the local officers of the Crown, and the character of the community where he is expected to perform his duty. These are important things to know, as every Counsel, civil or criminal, will admit, and the want of such knowledge very often militates against a good Crown officer to the detriment of himself and the prosecution. His appointment, too, is necessarily made only a short time before the opening day of the court. By the time he has communicated with the County Crown Attorney, received the depositions and written again for explanations, the court is upon him, and he finds himself but half prepared to present his case fairly, and perhaps not prepared at all to do battle with some able lawyer and difficult evidence on the other side. As a rule, the depositions give but little information; the fine points of the case do not appear on the face of the evidence taken down by some worthy layman who is very likely accustomed more to the axe than to the pen. The magistrates may be good, substantial men of their neighborhood, but their appreciation of the facts of a criminal case cannot be said to equal their honest intentions to do justice in the premises. The most a Counsel can gather from the papers is a general impression of what the evidence may be, not what it really is. In this connection it may well be pointed out that the turning points in a criminal prosecution do not often appear from preliminary examinations as recorded by the justices, and the Counsel for the Crown has to ascertain, as best he can, and often in a hurried and perfunctory manner, from the witnesses present at the court, just what the real facts are, which state of affairs, it is needless to say, often results in an acquittal when there ought to be a conviction: or in a traverse of a case at considerable expense to the country and a risk of losing by next court what little evidence there is against the offender.

Another very serious phase of the present state of things is that the evidence brought before the prosecuting counsel is not complete, for the reason that, in many cases, particularly those involving difficult questions of law and which come before the local officer perhaps for the first time in his practice, the requisite practical and experienced knowledge is not possessed by him and cannot be expected of him for the due preparation of the Crown brief. Very often, as we are informed by old Crown officers, the evidence brought forward is not pertinent to the issue, and is otherwise frequently inadmissible. Facts are left unproved, not from want of evidence to sustain them, but by reason of the proper witnesses not having been subpœnaed to prove them. The criminal law practice is not like civil proceedings. No latitude is permitted on the part of the Crown, whilst every indulgence is properly given to the prisoner. He has the benefit of all reasonable doubts. His defence is often permitted to be given in the loosest sort of manner, whilst the Crown is rigidly tied down to unwritten law and

comparatively unknown practice, to such an extent that an inexperienced Counsel may find himself blocked at the very simplest stage of his prosecution. There is, therefore, the gravest necessity for Counsel to be seized of all the facts, to weigh them carefully and considerately, to weed out all that is objectionable, and to be able, by a thorough study and knowledge of his case, to meet the many objections and surprises that are likely to beset his path before he is able to establish a case to go to the jury.

There is still another point to be considered. Every man placed upon his trial for a criminal offence is entitled to be tried fairly. The greatest care should be exercised on the part of the Crown in order that he may not be unjustly convicted, and it is always of the greatest consequence that evidence should not receive greater weight than it is entitled to, and that witnesses should not be allowed to magnify that into an important element against the prisoner which, as a matter of law, may not be of much importance in estimating the guilt or innocence of the accused. On the other hand, it is as clearly the duty of the Crown to see that the prisoner is not improperly acquitted, by reason of the non-production of proper, sufficient, and available evidence. Keeping these two objects in view, it is manifest that the greatest deliberation and care are necessary on the part of Crown Counsel in order that a fair and sufficient trial be had. Many cases are intricate, the evidence is often conflicting, the details frequently of the most minute character, and the feelings of the witnesses themselves require to be thoroughly and cautiously analysed. Clever defences have to be anticipated, lest there be a miscarriage of justice, and in a hundred other different ways, the public interest is to be considered and protected in criminal prosecutions, even where they are of a minor character. Such being the case, it is evident that Crown Counsel should be in possession of all the facts a reasonable time before the trial, and should be thoroughly competent to deal with the case before him in all its different branches.

The criminal law, whilst simple in much of its practice, presents at the same time some of the most difficult questions that can possibly arise in a legal practice. To select, therefore, as a Crown Counsel, a professional man whose engagements are purely of a civil character, except on one or two occasions in each year when he is entrusted with Crown work, is, to say the least of it, a somewhat dangerous proceeding; and there is no doubt that prosecutions which should, in the interest of the State, result in a conviction, collapse, not because the Crown Counsel is a man devoid of ability, but on account of his inexperience in criminal matters. Many additional arguments will suggest themselves to the reader why Crown Counsel should be, not only men of ability, but also of considerable knowledge and of varied practice in criminal prosecutions.

A remedy for all this is suggested. Why should not Counsel be selected for each circuit, and then occupy a position somewhat analagous to the public prosecutor in England? He should be kept informed of all questions likely to arise in the courts Oyer and Terminer within his circuit, and in order that he might be available at all times, his appointment should be a permanent one. He might be paid in fees, as Crown Counsel are at present, and an allowance might

be made for special services, for consultations, etc. If this scheme were adopted, Crown Counsel would go into court with his briefs thoroughly prepared. Good men could always be obtained to act as Counsel, and the conducting of Crown prosecutions could be raised to a very high standard.

As things are now, it does not pay a Counsel of any eminence to engage in Crown work. Take an assize where there are perhaps two criminal cases. The first day is generally lost in examining witnesses, and in consultation with the local Crown officer; perhaps the whole of the second day is taken up with the finding of the bills by the Grand Jury. A long civil case in the meantime intervenes, and counsel is detained until the end of the third or fourth day before he is able to dispose of the Crown business, and for this he receives less than a taxable fee on a civil brief for a few hours, unless one of the cases happens to be the charge of murder. Out of this sum he has to pay his expenses, the result being that he is practically out of pocket by the transaction. We believe that it is a fact that retainers by the Crown are refused from time to time on the ground of prior engagements, which shows that one civil brief at a contemporaneous assize pays better than the whole Crown business at another put together.

There is another feature to be considered in this connection. Whilst the Crown officer is a prosecutor, he is supposed to be semi-judicial in his capacity, and to be in a position to render valuable assistance to the court in determining the guilt of the accused. Under the present system, unless in exceptional cases, the Crown officer can be of very little aid to the trial judge, and we have no doubt that if the judges felt themselves at liberty to express their views, they would concur in what we say in reference to this point.

Coming to the second consideration, we would suggest that Crown Counsel, appointed permanently by the Government, should take the place of grand juries. As we have said, the public have, irrespective of political feeling, full confidence in the present Government that they would make good and careful appointments in this respect. Apart from the integrity and conspicuous ability of the Attorney-General, already referred to, upon whom would mainly fall the responsibility of making the appointments, he would, we are satisfied, be honestly and wisely aided in his selection by the very able men who, amongst his colleagues, are members of the same profession. No one knows better than they do the wants and necessities of the profession, and few men have had the experience they have gained, which is necessary to a wise and prudent choice of men to fill the important position of Crown Counsel. If these gentlemen adopt our suggestion, they will have, we believe, a system of administering justice not excelled in any other country, and the result will be that the Grand Jury will be found to be a needless ornament in the constitution of our courts. There are many reasons to be advanced in favor of our contention. We are disposed to think that the change we suggest would give an efficient and experienced body of Crown prosecutors. These officers would acquire a knowledge of their duty and of the cases before them which they cannot have under the present system, no matter how able or distinguished they may be. There would be no local influences at work in preferring a bill or preventing the presentment of an indictment in a proper case.

Persons charged with crimes would be presented fairly and at the same time protected where protection was found to be necessary. Delays would not occur in the trial of criminal cases. Evidence would, if available, be forthcoming, and where there was no probability of a conviction, the time of the courts would not be taken up, as it now frequently is, with charges which have no foundation except in personal feeling or prejudice. The Crown officers would be properly remunerated, and the Province could afford to pay reasonable fees and still effect a large saving every year to the country. In addition to all this, it must be admitted that an experienced and reputable lawyer is a far better judge of the necessity of a criminal trial in any particular case than a dozen grand juries could be; and if these matters were left entirely in his discretion, there would be fewer presentments due to fear, favor, or affection, and, as a natural consequence, there would exist a higher standard of administration, a better protection afforded to innocent men unjustly charged with crime, and a greater certainty of justice in cases where guilt lies at the door of the accused. The public interest and the welfare of her Majesty's subjects would be amply guarded, and the public treasury would be relieved of a heavy burden incurred in keeping up a system which is centuries behind the present utilitarian age.

We need scarcely add that we are not preferring or even suggesting any charge of inefficiency against the members of the profession who are selected under the present system, but we emphatically urge that a better, cheaper, and far more effectual system can be inaugurated, and we trust that our modest contribution to the grand jury discussion may result in a change either on the lines we have indicated, or in some other and better way—if such can be found. Our contention is that some change is necessary, and the best thought we can give to the subject (so far as our present light enables us to judge) leads us to urge a change in the direction we have endeavored to bring before our readers.

COMMENTS ON CURRENT ENGLISH DECISIONS.

(Notes on the March Numbers of the Law Reports—continued).

COMPANY—WINDING UP—CONTRIBUTORY—SHARES ALLOTTED ON FICTITIOUS APPLICATION—PRINCIPAL AND AGENT.

In re Britannia Fire Association—Coventry's case (1891), 1 Ch. 202, was an appeal by executors of a deceased allottee of shares from the decision of Kay, J., holding them liable to be placed on the list of contributories of the company which was being wound up. The appellant's testator had been allotted shares under the following circumstances. His father was a director of the company, and it was agreed between him and the other directors of the company, that for the purpose of making it appear that the whole share capital had been taken up, the shares remaining unallotted should be issued temporarily to the nominees of the directors until applied for by the public, there being no intention that either the directors or their nominees should incur any liability in respect of the shares. The testator's father, without his knowledge or concurrence, applied for shares for his son, the testator, who was accordingly registered as holder of 200 shares.

The son was residing abroad, and he never knew the shares had been applied for or allotted to him, never paid anything on them, and no certificate of allotment was ever issued to him. The father and son both having died, the latter without having recognized his position as a shareholder, the liquidator nevertheless placed his executors on the list of contributories, as Kay, J., held rightly; but the Court of Appeal (Lindley, Bowen, and Fry, L.JJ.) reversed his decision, on the ground that the case was governed by the ordinary law of contract, and that though the father of the testator and his co-directors might have made themselves jointly and severally liable on the ground of fraud, yet the facts did not establish any actual contract by the testator to take the shares which would justify placing his executors on the list of contributories.

REAL ESTATE—DEVISE IN TRUST—FAILURE OF HEIR OF BENEFICIARY—LEGAL ESTATE—RIGHT TO CALL FOR CONVEYANCE

In re Lashmar, Moody v. *Penfold* (1891), 1 Ch. 258, is a decision on a very nice question of real property law. Most practitioners would, we think, be inclined on first impression to come to the same conclusion which Kekewich, J., did; and yet, on further consideration, would probably be willing to admit that that conclusion was wrong. The facts were simple: Peter Lashmar died, leaving a will whereby he devised his reversion in certain lands to trustees for his son Charles in fee, subject to certain life estates. Charles died entitled to the equitable reversion, which he devised to trustees in trust to pay or to permit his widow to receive the rents during her lifetime or widowhood, and after her death or second marriage, upon trust for his son George, his heirs and assigns; and Charles empowered his trustees, with his wife's consent, and after her death during the minority of his son George, in their discretion, to sell the real estate and convey it to a purchaser. Charles' widow and son George both having died, the latter without issue and being illegitimate, and the surviving trustee of Peter being in possession of the estate, the tenants for life, under Peter's will, being also dead, this action was brought by the surviving trustee of Charles' will against the surviving trustee of Peter's will, claiming a conveyance of the legal estate. The question turned on whether under Charles' will the trustees, assuming the testator had a legal estate to devise, took the legal estate. Kekewich, J., though thinking that George took the estate under the devise to him, yet considered that the power of sale subsequently given in the will to the trustees entitled them to the legal estate, and he therefore decided in favor of the plaintiff. But the Court of Appeal (Lindley, Bowen and Fry, L.JJ.) reversed his decision, being of opinion that as soon as the widow of Charles died and George attained twenty-one, the trustees of Charles' will had no further duty to perform and had a bare trust, and therefore the right to call for the legal estate was in the beneficiary under the will and not in the trustees, and therefore the plaintiff, as surviving trustee, had no right to call for a conveyance of the legal estate, though the Court of Appeal admitted that if, as in *Onslow* v. *Wallis*, 1 Mac. & G. 506, on which Kekewich, J., based his decision, the plaintiffs had any duties to perform in reference to the estate, their decision would have been the other way.

BANKERS—DEPOSIT OF SECURITIES BY BROKER—FOREIGN BONDS PAYABLE TO BEARER—NEGOTIABLE SECURITIES—MEASURE OF DAMAGES.

Simmons v. *London Joint Stock Bank* (1891), 1 Ch. 270, is a very important decision on a question of mercantile law. The plaintiffs had deposited with a broker named Delmar a number of bonds and certificates of shares, etc., which the Court of Appeal assumed in the defendants' favor were negotiable securities. Some of these securities Delmar, without authority, sold, and others of a like character were bought by him and substituted in their place. All these bonds, certificates, etc., including the substituted ones, were entered in Delmar's books as belonging to the plaintiffs, the particular bonds or certificates being indicated therein by their numbers, or by other sufficient identification. Delmar, in order to secure an advance to himself, deposited the plaintiffs' bonds, etc., together with the securities of other customers, with the defendants. The defendants subsequently sold some of the plaintiffs' securities in part discharge of Delmar's debt to them. The present actions were brought to compel the defendants to deliver up such of the plaintiffs' securities as they still retained, and to account for the proceeds of those which they had sold. On the trial it appeared from the evidence that the bank officials assumed that the securities were not the property of Delmar individually, but of his customers; that brokers were accustomed to borrow money for their clients on the securities in their hands, and that they did this, not by borrowing on the securities of each client separately, but by borrowing on the securities of divers customers which they held, *en bloc*; and that the bank did not actually know that any one else was interested in the securities deposited by Delmar, and never asked any questions, assuming that he was acting within his authority, the defendants' manager admitting that he considered no useful purpose would be answered by making inquiry, because the honest customer would be offended, and the fraudulent one would give a satisfactory though false reply. Under these circumstances, Kekewich, J., held that the plaintiffs were entitled to the relief claimed; and on the question of damages, he held that the plaintiffs were not entitled to the value of the bonds which had been sold, at the highest market price which they had reached while in the defendants' hands, but only to what had been actually realized for them, with interest from the date of sale at four per cent. The plaintiffs were also held entitled to all dividends and income on the bonds, etc., sold or unsold, which the defendants had received. The Court of Appeal (Lindley, Bowen and Fry, L.JJ.) affirmed the decision of Kekewich, J., on the main question, no appeal being had on the question of damages. Whether the securities in question were in fact negotiable securities in the technical sense seems doubtful, and the judgment of the Court of Appeal points out that though an instrument may be framed so as to pass the benefit of the contract thereby evidenced by delivery to bearer, yet that alone does not constitute it "a negotiable instrument" in the technical sense, so that a *bonâ fide* transferee, without notice, would take any better title than his transferror had; but for the purpose of the decision the point was assumed in the defendants' favor, that the instruments were in fact negotiable securities. The assumption that a broker may raise money on deposit of his customers' securities in his

hands *en bloc*, without express authority, even though such securities be negotiable instruments, is, according to the Court of Appeal, without foundation in law; and whenever a bank has any reason to believe that the securities tendered by a broker as a security for an advance are not his own property, it is incumbent on the bank to make inquiry into his authority to raise money on such securities, at the peril of being called to account by the rightful owner in case the broker is acting without authority.

INFANT—SETTLEMENT BY INFANT—EXERCISE BY INFANT OF GENERAL POWER OF APPOINTMENT—FAILURE OF LIMITATIONS—RESULTING TRUST—INFANTS' SETTLEMENT ACT, 1855 (18 & 9 VICT., C. 43), SS. 1, 2 (ONT. JUD. ACT, S. 32).

In re Scott, Scott v. *Hanbury* (1891), 1 Ch. 298, an infant who was illegitimate, having a general power of appointment, by a settlement made on her marriage, with the sanction of the Court under the Infant's Settlement Act, 1855 (Ont. Jud. Act, s. 32), executed the power in favor of the trustees of the marriage settlement upon trust for herself for her separate use during the joint lives of herself and husband, with remainder to the survivor for life; and after the death of the survivor in trust for the children of the marriage, and in default of children as she (the wife) should appoint, and in default of appointment, if she should survive her husband, in trust for her absolutely; and if her husband should survive her, in trust for such persons as under the Statute of Distributions would have become entitled thereto at her death had she died possessed intestate and unmarried. The lady died under age, leaving no issue, and without having made any other appointment; being illegitimate, there was no one who could take under the ultimate limitation of the settlement. The husband, who survived his wife, claimed the trust fund as her administrator, and North, J., held that he was so entitled. It was contended that under s. 2 of the Infants' Settlement Act, 1855, the wife having died under age, the appointment made by the settlement was void, but this view was negatived, North, J., holding that the provisions of that section applied merely to settlements made by tenants in tail, that the settlement indicated an intention to exercise the power so as to make the property absolutely the settlor's own, and on failure of the ultimate limitation there was a resulting trust for the settlor, and therefore the husband was entitled.

COMPANY—WINDING UP—STAYING SEQUESTRATION—LANDLORD—LEAVE TO PROCEED NOTWITHSTANDING WINDING-UP ORDER—(R.S.C., C. 129, SS. 16, 17).

In re Wanzer (1891), 1 Ch. 305, was an application by a liquidator in a winding-up proceedings to set aside a sequestration issued by a Scotch landlord to enforce his hypothec for rent due by the company. North, J., held that the sequestration was void (see R.S.C., c 129, s. 17), but it appearing that the landlord's hypothec gives a security on the goods on the demised premises, he gave leave to proceed with the sequestration (see R.S.C., c. 129, s. 16), unless sufficient security was given for the rent for the current year, including a period previous to the winding-up order, on the terms of the landlord paying the costs of the motion.

PRACTICE—ORDER ON THIRD PARTY TO ATTEND AND PRODUCE DOCUMENTS—OBJECTION BY THIRD PARTY TO PRODUCE—ORD. XXXVII, R. 7 (ONT. RULE 580).

In re Smith, Williams v. *Frere* (1891), 1 Ch. 323, it was held by North, J., that under an order directing a person not a party to the action to attend and produce documents, though unqualified in its terms, it is nevertheless open to such person to raise any legal objection to the production of any document which he would be entitled to take upon being served with a *subpœna duces tecum*. He also held that under Ord. xxxvii, r. 7, production ought not to be ordered for the purpose of private inspection, but only in reference to some proceeding in the action, and that the order may be made *ex parte*. We may note that the Ont. *Rules* do not appear to contain any exact counterpart of the English *Rule* above referred to. Ont. *Rule* 580, however, contains a similar provision for the purpose of obtaining production on any motion; but it would appear from the cases that, though the English *Rule* is more general in its terms, it is intended to have no wider application than the Ont. *Rule* 580.

SOLICITOR AND CLIENT—RETAINER—TRUST FUND, IMPROPER INVESTMENT OF—BREACH OF TRUST—NEGLIGENCE OF SOLICITOR—LIABILITY OF PARTNERS—ACTIO PERSONALIS MORITUR CUM PERSONA.

In *Blyth* v. *Fladgate* (1891), 1 Ch. 337, the plaintiffs claimed to recover against a firm of solicitors and the personal representatives of a deceased member of the firm for loss of trust funds, occasioned by an improper investment thereof made by one of the partners who was also one of the trustees of the fund. The fund in question was standing to the credit of the firm at their bankers when the money was invested by the partner, Smith. At this time there were no trustees of the fund, but Smith and two others were subsequently appointed trustees, and never repudiated the transaction. The work was done by Smith, but the firm received payment therefor out of the trust funds. In an action against the trustees, they were held to be jointly and severally liable to make good the loss sustained. The property not having been sold or the trust funds replaced, the beneficiaries in the present action sought to make the firm of solicitors and the personal representatives of the deceased partner liable for the loss of the funds on the ground of negligence, though Smith's partners had not any knowledge of the property at the time when the mortgage transaction was carried out. Stirling, J., held that the trust funds having been in possession of the firm with notice of the trusts, they could only discharge themselves from liability by showing that they were duly applied in accordance with the trusts; that though the trustees had adopted the investment, that would not discharge the solicitors from liability for negligence if they had knowledge that the investment was one which could not be properly made by duly constituted trustees; and this knowledge he held they had, as they were bound by the action of Smith, acting as a member of the firm and within the scope of his authority; that the liability of the members of the firm was not merely joint, but several, and therefore that the recovery of judgment against Smith did not discharge the other members of the firm. He also held the claim to arise against the firm *ex contractu*, and as founded on an implied promise to exercise reasonable care and skill as solicitors;

and therefore the estate of the deceased member of the firm was liable. He also held that the solicitors and the representatives of the deceased partner were bound to indemnify the co-trustees of Smith against this liability to the beneficiaries, and that Smith was therefore not entitled to contribution from his co-trustees.

WILL—CONSTRUCTION—CHARITABLE GIFT—CY-PRÈS.

In re Slevin, Slevin v. *Hepburn* (1891), 1 Ch. 373, a testator by his legacy gave a number of legacies to various persons, using the introductory words, "I bequeath the pecuniary legacies following." He then gave a number of legacies, using the introductory words, "I bequeath the following charitable legacies," and amongst such last-mentioned legacies was one to an orphanage voluntarily maintained by a lady at her own expense, which was in existence at the time of the testator's death, but was discontinued shortly afterwards, and before the assets were administered. The question for Stirling, J., was: What was to be done with this legacy? He held that as the gift was to a private institution, maintained at the expense of an individual, the Court could not, on failure of the particular charity, apply the legacy *cy-près*, and, secondly, that no general charitable intention could be inferred from the introductory words, and the legacy therefore fell into the residue.

PRINCIPAL AND AGENT—EMPLOYMENT BY PAROL OF AGENT TO BUY LAND—DENIAL OF AGENCY—PURCHASE BY, AND CONVEYANCE TO, AGENT—PRACTICE—PLEADING—STATUTE OF FRAUDS—AMENDMENT.

James v. *Smith* (1891), 1 Ch. 384, involves two points, one of law and the other of practice. The action was brought claiming that the defendant had been employed by the plaintiff to purchase a house for him, and that the defendant had purchased the house but taken the conveyances in his own name, and the plaintiff claimed a declaration that the defendant was trustee of the house for, and should be ordered to convey it to, the plaintiff. The defendant by his statement of defence, denied the facts alleged by the plaintiff, and stated that he intended to rely on the 4th section of the Statute of Frauds. Kekewich. J., held that the 7th section of the Statute of Frauds afforded a defence to the action, but not the 4th section; but he held the defendant could not rely on the 7th section because he had by his defence only claimed the benefit of the 4th section, and he refused to permit an amendment; but on the facts he found in favor of the defendant, and dismissed the action, but without costs.

SHIP—MANAGING OWNER—SHIP'S HUSBAND—SECRET PROFIT.

In *Williamson* v. *Hine* (1891), 1 Ch. 390, Kekewich, J., held that a managing owner of a ship is not entitled to retain or to charge against the ship, in the absence of any special bargain so to do, any profit for himself by way of commission or otherwise for procuring charters or freights, whether he be a ship-broker or procures them himself, or employs another broker for the purpose, because the procuring of charters and freights is part of the duty of a managing owner.

SHIP—COLLISION—FOG—ALTERATION OF HELM.

The Vindomara v. *The Haswell* (1891), A. C. 1, was an appeal from the Court of Appeal (14 P. D. 172) in which the House of Lords affirmed the decision of the Court below, holding that there is no hard and fast rule that where two steamships in a fog are approaching one another so as to involve risk of collision, neither ship ought to alter her helm until the signals of the other give a clear indication of her direction, but that each case must depend on its own circumstances, and these may afford reasonable ground for believing what the direction must be.

SHIP—DAMAGE—WHARF—WHARFINGER, LIABILITY OF.

In *Tredegar* v. *The Calliope* (1891), A. C. 11, the House of Lords overruled the decision of the Court of Appeal (14 P.D. 138), see *ante* vol. 25, p. 557, holding that on the evidence the injury to the ship was caused by the captain and pilot attempting to berth her alongside the wharf at a time of the tide, when it was not safe to do so for a vessel of her draught and trim, and therefore that the inequalities in the bed of the river adjoining the wharf were not the immediate cause of the injury.

SHIP—CHARTER PARTY—PAYMENT OF HIRE OF SHIP TO CEASE UNTIL SHIP IN AN EFFICIENT STATE.

In *Hogarth* v. *Miller* (1891), A. C. 48, the case turned upon the instruction of a charter-party, which provided that the appellants should maintain the vessel in a thoroughly efficient state in hull and machinery, and that in the event of a break-down, etc., whereby the ship was stopped for more than 48 consecutive hours, the payment of hire should cease until the vessel should be again in an efficient state to resume service. The vessel was disabled on a voyage to Harburg, and she had to put back to the port of Las Palmas. By arrangement between the parties she was towed by tug from Las Palmas to Harburg, the expense of the tug being treated by agreement as general average on cargo, ship and freight. On her arrival at Harburg the cargo intended for that port was discharged, the ship's steam winches being available. The House of Lords (affirming the Court of Session) held that the appellants had no claim for hire during the voyage from Las Palmas to Harburg, the ship not being independently efficient for the voyage; but, varying the decision of the Court of Session, they held that the appellants were entitled to hire for the time occupied in discharging the cargo at Harburg, as the ship was in an efficient state for that particular employment.

LIBEL—PRIVILEGED COMMUNICATION—ONUS PROFUNDI—MISDIRECTION.

In *Jeuoure* v. *Delmege* (1891), A. C. 73, the Judicial Committee of the Privy Council on the appeal from the Supreme Court of Jamaica, in an action for libel, lay down that there is no distinction between one class of privileged communication and another, that wherever the communication is privileged it is necessarily implied that the occasion of the communication being made rebuts the inference that the defendant was acting *malâ fide*, and the jury having been told, on the trial, that the existence of privilege was contingent upon

whether in their opinion the defendant honestly believed his volunteered communication to be true, and that the burden of proof on that point was on him, it was held by the Privy Council that there was misdirection, and a verdict for the plaintiff was set aside and a new trial ordered. The libel complained of in this case was a letter written by the defendant to an Inspector of Constabulary, stating that he had been informed that a poor woman had died in labor in consequence of want of medical attendance, and that the plaintiff, a medical man, had been applied to to attend to her, and had refused to go unless paid his fee, and that such cases were by no means an uncommon occurrence, and requesting him to inquire into the matter and report the case to the proper authority. The defendant was in fact a justice of the peace, but the Privy Council held that nothing turned upon that, because "to protect those who are not able to protect themselves is a duty which every one owes to society." The judicial committee of the Privy Council adopt the language of Cotton, L.J., in *Clark* v. *Molyneux*, 3 Q.B.D. 237, which was not brought to the attention of the colonial Court. He said in reference to a privileged communication: "The burden of proof lay upon the plaintiff to show that the defendant was actuated by malice; but the learned judge told the jury that the defendant might defend himself by the fact that those communications were privileged, but that the defendant must satisfy the jury that what he did he did *bonâ fide*, and in the honest belief that he was making statements which were true. It is clear that it was not for the defendant to prove that he was acting from a sense of duty, but for the plaintiff to satisfy the jury that the defendant was acting from some other motive than a sense of duty."

Notes on Exchanges and Legal Scrap Book.

An Arrest of Judgment Extraordinary.—Talking the other day with one of our grave and reverend seniors of the law, he related the following:—About forty years ago an indictment for murder was laid against some colored man in the western part of Upper Canada. Fortunately for the prisoner, the Crown counsel and the judge who presided at the trial were all somewhat green on the subject of pleading in criminal cases. During the trial the narrator of the anecdote took occasion to look at the indictment, and pointed out to the prisoner's counsel a fatal defect in it. The prisoner was found guilty of murder; whereupon his counsel moved in arrest of judgment on the ground pointed out. The learned judge who presided at the trial decided to reserve the case for the opinion of his brother judges. Accordingly the record and other papers were transmitted to Toronto. Some delay took place in bringing the matter on for argument, and in the meantime the indictment was knocking about with other papers in the possession of the judges' clerk. When the case at length came up for debate the last page of the indictment (which was written on paper), and which contained the most important part of the indictment, was missing. What had become of it, whether it had become food for the mice,

or been applied to other ignoble purposes, no one could tell. A half a loaf is said to be better than no bread, but a half an indictment is hardly sufficient to hang a man on, and so the prisoner was discharged. For many years afterwards it became the invariable rule to write all indictments for capital offences on parchment.

THE VAGLIANO CASE.—. . . . "Longa decem tulerunt fastidia menses." After nine months' consideration and reconsideration, the Lords have at last given judgment in the *Vagliano Case*. It was generally expected that the decisions of the Courts below would be reversed, and that their lordships would not be unanimous. Six judges against two have held that the loss on the bills of exchange, so ingeniously forged by the convict Glyka, must be borne by Messrs. Vagliano. In a question of such importance, it is too early to discuss in detail the conclusions arrived at by the noble and learned lords. We are disposed to think that the majority of the profession regard the decision with disapprobation, and the effect of this protracted litigation can hardly be considered satisfactory when we find that, taking all the trials together, there is actually a majority of judges in favor of the respondent Vagliano, viz., Mr. Justice Charles, five out of the six members of the Court of Appeal, and two law lords, as against Lord Esher and six law lords.

It is clear, from a perusal of the judgments, that all the judges were, by no means, influenced by the same considerations. The three elements which form the basis of the decision were: (1) Negligence generally on the part of Vagliano, and a conduct of his business which facilitated the frauds; (2) the doctrine of *estoppel;* and (3) the language of the Bills of Exchange Act, 1882, s. 7, subs. 3. To these, perhaps, may be added, as Lord Bramwell suggested, a dislike of the case of *Robarts* v. *Tucker* (20 Law J. Rep. Q. B. 270). Lord Selborne and Lord Macnaghten relied mainly on the first ground; the second was emphasised by the Lord Chancellor, who spoke of Vagliano by his letters of advice to the bank and acceptance, giving the bills as against himself, "qualities which, in their inception, they did not possess," "a genuineness" which did not otherwise belong to them. Lord Herschell took great pains to show that the persons named as payees on the forged bills were "fictitious" persons within s. 7, subs. 3 of the Act, notwithstanding that they were the names of well-known existing persons, who were actual correspondents of Vagliano. Lord Selborne expressly declined to take this view, of which Lord Bramwell's criticism is characteristically trenchant and vigorous. But Lord Selborne did expressly say that *Robarts* v. *Tucker*, in which a banker who had paid a bill on which the indorsements were forged had to lose his money, was not to be extended; and Lord Macnaghten devoted a considerable part of his concise and luminous judgment to distinguishing the case before the house from *Robarts* v. *Tucker*. Lord Bramwell's judgment was in his pithiest and most amusing style. He applied with great force what Mr. Grote calls the "cross-examining *elenchus* of Socrates" to Lord Herschell's verbal dialect, on which he remarks, "That beats me." He concludes his judgment with what looks like an afterthought—a farewell

Parthian shaft of sarcasm against his colleagues. He remarked that the head-note of his and Lord Field's opinion might be expressed in the most abstract form—viz., "A banker cannot charge his customer with the amount of a bill paid to a person who had no right of action against the customer"—whereas the opinions of the majority would have to be in a strictly concrete form, dealing with the facts of the particular case. The criticism is just—but not conclusive: logic and symmetry are not final *criteria* of truth. But it certainly is more satisfactory to be able to apply some definite principle, such as that enunciated by the learned lords.—*Law Journal.*

ELECTION OF A LAYMAN AS A JUDGE.—At a recent election of a Judge in a district of the State of Kansas, the Farmers' Alliance candidate was elected to fill the office. There is no reason surely, under our neighbors' system, good or bad as it may be, of electing their Judges, why the candidate of any one section of the community might not be as capable a man as the candidate of any other section; but in this particular case it so happens that the gentleman in question, although of admitted high character, is not a lawyer. Such an event could not happen in any country but that of the neighboring republic, where equally surprising things are of daily occurrence, as witness the recent case of a pardon given an offender on condition that he abstain from the use of intoxicating liquors. It does not appear that this man was elected by way of a joke, as was the case in a neighboring State, where a woman was elected mayor in order to show that such an event was possible, although there is nothing, we believe, in the Constitution of the United States which imposes a business or technical qualification on any official, except the State Engineer and Surveyor, who must be a "practical engineer." The election above referred to is, we think, the first instance in which a layman has been chosen, and it is probable that the country will await the result of his decisions before electing other men who in a higher court would probably be so absolutely incapable as to necessitate their removal; and the question as to whether incapacity from want of education is sufficient to remove such an official is a very wide field for discussion. Possibly our neighbors in such a case would avoid the difficulty by retiring him with a pension. We append an apparently genuine letter to the *American Law Review*, we presume from one of the "Allianse":

HOUSE OF REPRESENTATIVES,
TOPEKA, KANSAS, January 15th, 1891.

Eds. American Law Reeyou:

In your last knumber you praesume to speak disparraging of Bro. McKay, the farmer's allianse judge. You say with A snear, he can jedge good enough for Us. You forgit that menny of the moast emmenent Judges and Staitsmen commenst as farmers. Youer bioggrafy of Judge Miller shoes that a Man mey bea a grate Judge an yit no verry littel about lor when first commensin. if you was in Bro. McKays coart no dout you woud git the verry kind off jestis you doant want. he kin jedge good enogh for all sech as you. How Is it in youer Big sitties Doant you putt upp the judishel nominashuns at publik orkshun and bortter them auf to the Highest bider? Hevent you sed this time en agin? My Loryer sez you hev. Doant you kno thet ef A Yeller Dog was nommenated For supream jedge on the demmokat tikkett in Missoory an Cheaf gustise Marshel

ware nominaited on the republekin tiket the Y. D. wud bea Elektid by a strait Party voat? and ef the repeblikins in Saint Louis ware to nomenate a reggilar jackass woudent the Sante Lous duch all cum upp to the skratch and Elect Him. hesent the republekens allus hed a Niggur on thare tikket at every St. Lous elekshen? Bro Mekkay ken tak kare of R R companyes and the Trusts, en you had beter taik cair oph youer Subskripshen List in Kanses. Goa on and Drink yore Sante Lews Bear pison and all, but let onset peaple aloan. wea kansas pharmers doant wont enny moar Border Ruphenism in ourn and wea wunt have itt.

Yours So, So, A KANSAS FARMER.

P.S. Excuse mistaiks I hev to be a leetle equinomikel untel were get the procriation bill past then I intend to heve a Privet Sectary.

LIABILITY FOR FALSE IDENTIFICATION.—Bankers have long wanted more light upon the question of the liability of a party who identifies a stranger as Mr. So and So, where the identification turns out to be false, and the bank has suffered loss. Such cases are not infrequent. Payees of drafts and other instruments are often strangers at the bank of payment, and call upon accommodating friends, known to the bank, to identify them. Sometimes the friend is deceived, and makes a wrong statement of identity. If he made such a representation, knowing its falsity, no question would exist as to his liability for the injury. But where, without fraudulent intent in fact, and acting under a mistaken belief, he asserts that he knows the party to be of such a name, and the bank, itself ignorant, acts on the assertion to its injury, will the asserter be liable when the statement proves untrue? The banking community is at last favored with a precedent on this question from the Supreme Court of Colorado (*Lahay* v. *City National Bank of Denver*). A party stated to a bank that, the holder of an instrument was the payee therein named. The bank, thereupon, paid the money. The statement turned out erroneous, and the bank was compelled to pay the money over again to the real payee. It sued the party making the statement. He attempted to shield himself behind the general rule that, in an action for deceit, a party making a false statement must be shown to have had knowledge of its falsity in order to be held, and contended that as it was not so shown he was not liable. The court, however, upholds the liability, saying: "To the general rule requiring a party relying upon false representations to show not only that they were false, but that the party making the same knew such to be the case, there are some exceptions; as when one, as in this case, positively assures another that a certain statement is true, preferring at the time to speak of his own knowledge, and about a matter not known to the party to whom the representations are made, he cannot be allowed to complain because another has placed too much reliance upon the truth of what he himself has stated. In this case the bank was adjudged not only entitled to recover the amount paid, but also costs and counsel fee paid in unsuccessfully defending a suit by the real payee, of which it had given the party who made the representation notice. This decision should be welcomed by bankers as a progressive step in the line of increasing definiteness in the law regarding liability of third persons for identifications. The general principles which underlie the action of deceit are now

applied to the particular case of identity at bank, and a party who makes a positive statement as to the identity of a person, which the bank relies on to its injury, may be made liable although he may not have known of the falsity of the statement when he made it. Aside from the instruction which this case affords to bankers, it is useful, furthermore, to those who are called upon to accommodate customers, patrons, or supposed friends, by identifying them at the bank, by showing them the liability incurred in making positive statements of identity which turn out erroneous, and thus teaching the necessity for the exercise of care and caution before making such statements.—*Banking Law Journal.*

RAILWAY COMPANIES AND PASSENGERS.—An interesting action for personal injuries brought against a railroad company has lately been decided by the Supreme Court of Alabama (*Montgomery & E. R'y Co.* v. *Stewart*, 8 Southern Reporter, 708). A passenger was waiting at a station, and the incoming train merely slackened up without coming to a stop. While the train was thus moving at the rate of about two miles an hour, the conductor cried "all aboard!" Said passenger thereupon endeavored to board the train, and, while he was making such effort, the speed was suddenly accelerated, whereby he was injured. The Court held that under the circumstances the passenger was not negligent in attempting to get on the train, and that the company were liable. The following is from the discussion on this point: "The situation created by defendants' servants, as averred and as supported by the tendencies of the evidence, was in itself an invitation to those waiting at the station for the train to get aboard of it, and in the nature of an authoritative assurance that it was safe for them to do so. Confessedly the train ought to have stopped, was signalled to stop, recognized the signal, and slowed down to a speed of not exceeding two miles an hour in partial obedience to it. Confessedly, also, it did not stop, nor were any indications given of a purpose on the part of those in control of it to come to a full stop, but, on the contrary, a tendency of the evidence goes to show that no intention to fully stop was evinced or even entertained, and to all appearances the only opportunity meant to be afforded plaintiff to get on was such as he might enjoy from the maintenance, while passing the station, of the low rate of speed to which the train had been reduced. That a situation, so to speak, or an aspect of affairs, may be produced by trainmen, which will as fully import an invitation or direction to action on the part of passengers as would oral instructions by employees, we do not doubt (*Solomon* v. *Railway Co.*, 103 N.Y. 437, 9 N.E. Rep. 430). That, if the jury found the facts stated above, and which are alleged in the complaint, to exist, they would have been authorized to find further that an invitation to the plaintiff to board the train was involved in them is equally clear. So finding, it follows as a matter of course, the danger not being obvious, that plaintiff was not negligent in making the attempt to get on the slowly moving train. Authorities *supra*. Moreover, if the facts referred to were found by the jury, they involved and served to impose another important duty upon defendants' employees, with respect to the knowledge that they must have

that no passenger is in a position of danger before the accelerating the movement of the train. Ordinarily, the duty of trainmen in that connection is performed when the train is brought to a standstill for a length of time which is reasonably sufficient to enable passengers to get on or off by the exercise of due care and diligence on their part; when this is done, there is no duty resting on employees to see and know that passengers desiring to alight have done so, or that persons desiring to take passage are safely on board (*Raben* v. *Railway Co.*, Iowa, 35 N.W. Rep. 645; *Straus* v. *Railway Co.*, 75 Mo. 185, and 86 Mo. 421; *Railway Co.* v. *Williams*, Tex., 8 S.W. Rep. 78; *Railroad Co.* v. *Peters*, Pa., 9 Atl. Rep. 317). Where, however, a reasonable opportunity is not afforded by holding the train stationary for passengers to get on and off, but they are invited and expected to do so while the train is moving at a low rate of speed, a different rule ought to, and in our opinion does, obtain. An invitation thus conveyed implies, at least, an assurance that the momentum will not be increased until all persons desiring to come aboard have done so, and imposes a correlative duty on those in charge of the train not to increase the speed without knowing that no person intending to act on the invitation is so situated as to be imperilled thereby."—*New York Law Journal.*"

THE OFFICE OF A JUDGE.—In view of the difficulty recently experienced in England in inducing a Judge of the High Court to resign a position which he was unable on account of failing abilities to fill, the following from the *Justice of the Peace* will be read with interest by those who have an inclination to inquire into the powers by which such an officer can be removed:

"We may take for our text the following passage from the letter of the First Lord of the Treasury, which was lately published amongst the correspondence on this subject in all the leading daily papers, viz.: "The only course of action open to Government in the case of a judge whose conduct merits removal is by address to the Crown in both Houses of Parliament. The Constitution has very properly made the judges absolutely independent of the Government of the day, which, so far as they are concerned, possesses no paternal or disciplinary authority; and any member of Parliament is equally entitled to move an address with any member of the Government. But this power should obviously only be exercised with abundant specific proof of the necessity to the public interest of that course."

It is generally known at the present day that the commissions of the judges run *quamdiu se bene gesserint.* "We owe this important provision to the Act of Settlement; not," says Hallam, "as ignorance and adulation have perpetually asserted, to His late Majesty Geo. III." (Hallam, Const. Hist. 2, 545). Amongst the provisions of section 3 of the Act of Settlement, 12 & 13 Will. 3, c. 2, it is enacted that "judges' commissions shall be made *quamdiu se bene gesserint*, and their salaries ascertained and established; but upon the addresses of both Houses of Parliament it may be lawful to remove them." From this it has been at times hastily assumed that judges' commissions were not, previously

to the Act of Settlement, in the form thereby provided. Such, however, is not the case. The provision which we have quoted from the Act of Settlement was not, indeed, contained in the hasty and imperfect Bill of Rights. Hallam says that "in the debates previous to the Declaration of Rights, we find that several speakers insisted on making the judges' commissions *quamdiu se bene gesserint*, that is, during life or good behavior, instead of *durante placito*, at the discretion of the Crown." "The former," he continues, "is said to have been the ancient course till the reign of James I." (Hallam, Constitutional History, 2, 544). In Cobbet's Parliamentary History the only expression of the kind is attributed to Sir Richard Temple in the further debate on the state of the nation, January 29th, 1688-9. (5 Parl. Hist. 54). Foss more carefully confines himself to observing that "it has generally been supposed that, up to the end of 1640, the judges were always appointed *durante bene placito;* but several instances occur previously of their patents being *quamdiu se bene gesserint.* It is sufficient to mention the late one of Chief Baron Walter, whose elevation to the bench in 1625 was in that form, and who refused to be dismissed in 1630 without a *scire facias*, 'whether he did so *bene se gerere* or not.'" (Foss, Judges, 6, 210). And, although the patents of Cromwell's judges were in the same form, yet that did not prevent the Lord Protector from removing Newdigate, J., from the Upper Bench in 1655, "for not observing the Protector's pleasure in all his commands." But there is no doubt at all that it was the judicial scandals of the reign of Charles II. and James II. that led to the particular provision in the Act of Settlement above cited. *Durante bene placito* was substituted for *quamdiu se bene gesserint* in all the later patents of Charles II.'s, and in all the patents of James II.'s judges, the fact being particularly noticed by Siderfin, the reporter, in the case of Sir Richard Rainsford on his promotion as a justice of the King's Bench in 1669. (1 Sid. 408.) No hesitation was exhibited in these times in removing those judges who were deemed too honest and conscientious, and in raising others to the judgment seat who were likely to prove supple instruments of the ruling powers. (Foss, Judges, 7, 4.) And the result of this was neatly summarised by Lord Chancellor Jeffreys (a good authority, as he himself appointed the majority of them), when he said to Lord Clarendon, "As for the judges, they are most of them rogues." (Foss, Judges, 7, 201.) The judges appointed in the reign of King William III. were all appointed by patents *quamdiu se bene gesserint* so that the Act of Settlement only confirmed that practice at the close of the reign, but the death of that king was the occasion of the establishment of the principle that, notwithstanding the Act of Settlement, the existing patents were determined by the demise of the Crown. In this respect the law was altered by the statute 1 Geo. 3, c. 25, at the earnest recommendation of the king himself. So that now the law as to the tenure of the office of a judge is, and has been since 1760, that he is appointed by the Crown by patent *quamdiu se bene gesserint*, such patent not being determined by the demise of the Crown, but the holder being removable on an address from both Houses of Parliament. As regards English judges the modern enactment is section 5 of the Supreme Court of Judicature Act, 1875, whereby it is provided that all the judges of the High

Court of Justice and of the Court of Appeal respectively, with the exception of the Lord Chancellor, shall hold their offices as such judges respectively during good behaviour, subject to a power of removal by Her Majesty, on an address presented to Her Majesty by both Houses of Parliament.

We believe, however, that the only occasion since the Act of Settlement in which it was moved in Parliament that an address should be presented to the Crown for the removal of a judge from his office was in the case of an Irish judge, Mr. Justice Fox, in 1804-6. He had been appointed one of the justices of the Court of Common Pleas in February, 1800, and, in the summer of the year 1803 (memorable for the insurrection of July, involving the murder of Lord Kilwarden, the Lord Chief Justice of the King's Bench), he went as one of the judges of assize on the North-West Circuit in Ireland. With reference to his conduct at the assizes held at Lifford and at Inniskillen on this circuit in fining several magistrates and jurymen, three several petitions were laid before the House of Lords in May and July, 1804. (Lords' Journals, 44, 558, 642, 644; Cobbett's Parliamentary Debates 2, 475, 785, 786, 925.) The Marquis of Abercorn, who brought forward the first petition, expressed a hope that proceedings would have followed on the part of the Government. However, the Government did nothing, and upon the matter being again brought forward, June 27, 1804, the Lord Chancellor (Lord Eldon) said: "When that great improvement in the constitution, the independence of the judges, took place, it was enacted that they should be removable only on an address to His Majesty from both Houses of Parliament. There was also another mode in which a judge, who had misconducted himself in the exercise of his office, might be proceeded against, and that was by impeachment by the Commons before that House. As this was the only instance since the Revolution in which charges had been brought forward against a person filling so sacred, important and dignified a situation as that of one of the judges of the land, sworn to administer the laws with truth and impartiality, he thought their lordships could not be too circumspect in the observance of those forms which the example of this case would operate hereafter as a precedent." (Cobbett, Parl. Deb. 2, 852.) Articles of complaint were consequently formulated and presented, grounded on the petitions above referred to. (Cobbett, Parl. Deb. 2, 950.) However, the Parliament was prorogued before the matter was disposed of. But in the following session it was again brought forward (Cobbett, Parl. Deb. 3, 22), and the same petitions were again presented, when Lord Eldon, repeating his former remarks, pointed out that the question must ultimately be "whether the facts alleged against Mr. Justice Fox were such as to call upon their lordships to concur in an address for his removal." (Cobbett, Parl. Deb. 3, 46.) The Lords appointed a committee to consider the matter. (Lords' Journals, 45, 14, 21; Cobbett, Parl. Deb. 3, 58, 144, 571.) This committee appear to have sat from time to time and heard evidence, but the matter went over to another session. At the beginning of the next session the former proceedings were vacated as inconestably irregular, and, on the motion of Lord Eldon, a resolution was passed declaratory of the general principle upon which the House had, up to that time,

proceeded in the case, viz., for the purpose of enabling the House to determine whether they ought to offer an address to His Majesty concerning the conduct of Mr. Justice Fox, and subsequently the House resolved itself into a committee of the whole House to investigate the matters of complaint on that footing. (Cobbett, Parl. Deb. 5, 2; Lords' Journals 45, 181.) But the order for this committee was afterwards discharged, it being suggested by Lord Hawkesbury that the most proper and regular course of proceeding was that an address should be moved to His Majesty embodying the facts upon which the charges were founded, and then that the whole should be referred to a committee of the House for the purpose of affording a regular opportunity of proving at the bar the allegations stated in the address. (Cobbett, Parl. Deb. 5, 35.) Accordingly, on the 22nd May, 1805, it was moved that an address should be presented for the removal of Mr. Justice Fox from his office (Cobbett, Parl. Deb. 5, 45), and the matter was referred to a committee of the whole House; on May 28 and 29, a very interesting debate took place respecting the form and manner in which Mr. Justice Fox should be allowed to attend, which resulted in a resolution that if Mr. Justice Fox should think proper to attend the committee of the whole House during the proceedings, he ought (not having received a writ of summons) to be accommodated with a chair below the bar, and it was also resolved that all parties might be heard by counsel. (Lords' Journals, 45, 219; Cobbett, Parl. Deb. 5, 126, 139.) Mr. Justice Fox accordingly attended the opening proceedings before the committee, habited in his judicial robes, and was placed in a chair below the bar. (Cobbett, Parl. Deb. 5, 154.) The committee sat several times and heard a quantity of evidence in support of the charges, but no cross-examination was allowed. (Lords' Journals 45, 253, 295; Cobbett, Parl. Deb. 5, 165, 175, 184, 242, 324.) Lord Auckland on June 17, 1805, made a motion for the postponement of further proceedings, which, if carried, would virtually have ended the matter, but it was negatived after debate, Lord Auckland recording a protest because amongst other reasons some of the charges amounted to charges of crime or misdemeanor, and he was not satisfied that the clause of the Act of Settlement respecting the removal of judges from their offices in consequence of the joint addresses of the two Houses of Parliament meant, or could be construed, to take the judges from the protection of the general law of the land. (Lords' Journals, 45, 319; Cobbett, Parl. Deb. 5, 424.) Then a bill was brought in to continue the proceedings until the next session. (Cobbett, Parl. Deb. 5, 446, 620, 635.) The matter lingered on through the next session. (Cobbett, Parl. Deb. 6, 12, 176, 249) until at last, on June 13, 1806, Mr. Justice Fox petitioned the House to consider his case, stating the hardship of delay, which petition was considered on the motion of Lord Grenville, June 19, 1806, that further proceedings should be adjourned practically *sine die*, that is to a day when the House would, in all probability, not meet. Lord Eldon opposed the motion, but the Lord Chancellor (Lord Erskine) supported it. It was finally agreed to by 25 Lords against 16, Lords Abercorn, Hardwicke, Eliott, Hawkesbury, and Longford, recording a protest upon the journals of the House. (Lords' Journals, 45, 715; Cobbett, Parl. Deb. 752.)

Mr. Justice Fox, subsequently, continued to exercise his judicial functions unmolested for the space of 10 years till 1816, when he resigned owing to failing health.

As a constitutional precedent, the case has but little value. It goes to confirm the spirited protest of Lord Chief Justice Holt, who, upon a complaint to the Lords being preferred against him for what was alleged to be an undue exercise of his judicial functions, replied that he was bound to exercise his judicial functions according to law and the best of his judgment, and that his conduct was not examinable before their Lordships. The case of Mr. Justice Fox shows what difficulties the Lords might easily land themselves in by attempting to investigate complaints against the judges without the concurrence of the House of Commons, and it shows that certainly, at that time, it was not considered that the Government of the day had any special power or duty in the matter.

The lack of other precedents has been ascribed to the paternal influence of the chiefs of the old courts of Queen's Bench, Common Pleas, and Exchequer over their puisne brethren, and to the fact that the constitution of the courts in that way rendered it easier for his fellows readily to observe a failure of power in any particular judge, and to use their influence with him to retire in time. But that argument will not entirely cover the ground, for it manifestly has less force with regard to the chiefs themselves, and no application at all to the cases of the Vice-Chancellors and Chancery judges. And yet in England only, and during only the earlier part of the reign of Her present Majesty, certainly, two Chief Justices and two Vice-Chancellors retired, owing to confessed increasing infirmities, without any outside power put upon them to do so, and even amid general and sincere expressions of public regret. . . ."

DIARY FOR APRIL.

1. Wed.....Prince Bismarck born, 1815.
5. Sun.....*1st Sunday after Easter.* Canada discovered, 1499.
6. Mon.....County Ct. Sittings for Motions. Supreme Ct. Sittings.
7. Tues.....County Ct. Non-Jury Sittings, except in York. Great fire in Toronto, 1847.
8. Wed .....Hudson Bay Co. founded, 1692.
12. Sun.....*2nd Sunday after Easter.*
13. Mon.....County Court Non-Jury Sittings in York.
14. Tues.....Princess Beatrice born, 1857.
15. Wed.....President Lincoln assassinated, 1865.
17. Fri.....Ben. Franklin died, 1790.
18. Sat.....First Newspaper in America, 1704.
19. Sun.....*3rd Sunday after Easter.*
20. Mon.....Last day for Call and Admission notices.
21. Tues.....Exchequer Court sits at Montreal.
23. Thur.....St. George's Day.
24. Fri.. .....Earl Cathcart, Governor-General, 1846.
25. Sun.....St. Mark.
26. Sun..... *4th Sunday after Easter.*
27. Mon.....Toronto captured (Battle of York), 1813.
28. Tues.....Exchequer Court sits.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

[March 10.

RE ALLENBY AND WEIR, SOLICITORS.

Solicitor and client—Costs of unnecessary proceedings—Disallowance of—Proceedings by writ of summons where summary application sufficient—Administration order.

The decision of ROBERTSON, J., 13 P.R. 403, affirmed ; BURTON, J.A., dissenting.

Bain, Q.C., for the appellants.

William Davidson for the respondents.

MCINTOSH *v.* MOYNIHAN.

Sale of land—Statute of Frauds—Memorandum in writing.

An acceptance in writing by the owner of land of a written offer therefor, addressed to him, but unsigned by any purchaser, and without any purchaser being named or described therein, is not a sufficient memorandum to satisfy the statute, and does not become binding upon him when a purchaser is subsequently found who signs the offer.

Bain, Q.C., for the appellant.

J. E. Robertson and *O. A. Macklem* for the several respondents.

MCCRANEY *v.* MCCOOL.

Partnership—Dissolution—Pending Contract.

This was an appeal by the defendants from the judgment of the Queen's Bench Division, reported 19 O. R. 470, and came on to be heard before this Court [HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A.] on the 20th and 21st of January, 1891.

McCarthy, Q.C., and *M. J. Gorman*, for the appellants.

Aylesworth, Q.C., for the respondents.

March 10th, 1891. The Court dismissed the appeal with costs, agreeing with the reasons for judgment given in the Court below.

IN THE MATTER OF THE CENTRAL BANK OF CANADA.

NASMITH'S CASE.

Company—Banks and banking—Winding-up Act—Shares—Subscription for—Transfer of—R.S.C., c. 120, ss. 20, 29, 70, 77.

This was an appeal by Nasmith from the judgment of BOYD, C., reported 16 O.R. 293, and came on to be heard before this Court [HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A.] on the 25th and 26th of September, 1890.

A. C. Galt for the appellant.

W. R. Meredith, Q.C., and *F. A. Hilton*, for the respondents.

March 10th, 1891. The Court dismissed the appeal with costs, holding that the main questions involved in the appeal were concluded by the judgment in *Baines' Case*, 16 A.R. 237, and upon the points not fully discussed in that case agreeing with the reasons for judgment in the Court below, and with those given in the judgment of the Master-in-Ordinary, reported 25 C.L.J. 238.

SAWYER *v.* PRINGLE.

Sale of goods—Conditional sale—Default—Seizure—Re-sale—Right to sue for deficiency.

After default in payment by the purchaser of a machine under an agreement whereby the property was not to pass until payment in full, with a provision that on default the whole price should fall due and that the vendors should be at liberty to resume possession, nothing being

said as to resale, the vendors seized the machine and re-sold it, and, after crediting the proceeds, brought this action to recover the balance of the original price.

Held [MACLENNAN, J.A., dissenting], that by the re-sale the original agreement had been put an end to, and that the plaintiffs had no right of action.

Per MACLENNAN, J.A. The vendors became in effect mortgagees of the machine, and on default in payment were entitled forthwith to sell and then sue for the unpaid balance.

Hoyles, Q.C., and *J. Chisholm* for the appellants.

J. M. Clark and *C. H. Widdifield* for the respondents.

PAISLEY *v.* WILLS.

Specific performance—Want of title—Repudiation.

This was an appeal by the defendant from the judgment of the Common Pleas Division, reported 19 O.R. 303, and came on to be heard before this Court [HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A.] on the 16th of January, 1891.

Bain, Q.C, for the appellant.

Shilton for the respondent.

March 10th, 1891. The Court dismissed the appeal with costs, agreeing with the reasons for judgment given in the Court below.

TOWNSHIP OF SOMBRA *v.* TOWNSHIP OF CHATHAM.

Municipal corporations — Drainage — R.S.O. (1887), c. 184, s. 569, et seq.

The burden of extra or unforseen expense in connection with drainage works, such as, *e.g.*, damages recovered because of negligent construction, must be borne by the ratepayers originally assessed for the cost of the works, and not by the general funds of the municipality.

Pegley, Q.C., for the appellants.

W. R. Meredith, Q C., and *Kittermaster*, for the respondents.

MCNAMARA *v.* KIRKLAND.

Mechanics' lien—Proceeding to realize—R.S.O. (1887), c. 126, s. 23.

A defence filed by a lienholder within the period mentioned in s. 23, c. 126 of R.S.O. (1887), in an action by the owner of the property to set aside the lien, is not a "proceeding to realize the claim" within the meaning of that section, though a counter-claim, if properly framed and a certificate thereof duly registered, might be.

S. R. Clarke for the appellant.

Watson, Q.C., and *H. C. Fowler*, for the respondent.

CAMPBELL *v.* THE KINGSTON & BATH ROAD COMPANY.

Tolls—Road company—Lease of tolls—R.S.O. (1887), c. 159.

A company incorporated under "The General Road Companies Act," R.S.O. (1887), c. 159, may validly lease a toll-gate and the right to collect tolls thereat, and are not liable for the lessee's acts done quite apart from the contract and not under or in obedience to it or by the instructions or direction of the company.

Britton, Q.C., and *Langton*, Q.C., for the appellants.

McIntyre, Q.C., and *Lyon*, for the respondent.

[March 26.

BARRY *v.* ANDERSON.

Mortgage—Power of sale—Assigns—Short Forms Act, R.S.O. (1887), c. 107.

A mortgage made in alleged pursuance of the Short Forms Act contained the following provisions as to sale:—"Provided that the said mortgagees on default of payment for one month may, on ten days' notice, enter on and lease or sell the said lands; and provided also that in case default be made in payment of either principal or interest for two months after any payment of either falls due, the said power of sale and entry may be acted upon without any notice; and also that any contract of sale made under the said power may be varied or rescinded; and also that the said mortgagees, their heirs, executors, administrators and assigns, may buy in and resell without being responsible for any loss or deficiency on re-sale."

Held [BURTON, J.A., dissenting], that the power of sale could be validly exercised by the assigns of the mortgagees.

In re Gilchrist and *Island*, 11 O.R. 537, and *Clark* v. *Harvey*, 16 O.R. 159, considered.

W. Cassels, Q.C., and *T. P. Coffee*, for the appellants.

Moss, Q.C., and *T. P. Galt*, for the respondents, the Chadwicks. *A. H. Macdonald*, Q.C., and *W. Macdonald*, for the respondents, the Andersons.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

Div'l Court.] [Feb. 2.

MOORE *v.* JACKSON.

Husband and wife—Separate estate of woman married in 1869—Lands acquired before and after 1st July, 1884—R.S.O., c. 132, s. 7—R.S.O., c. 134, s. 3—Tenancy by the curtesy—Sale of separate estate, subject to.

The effect of R.S.O., 1877, c. 125, s. 3 (now R.S.O., c. 132, s. 4, s-s. 2), is to deprive the husband of any estate, by the curtesy or otherwise, *during the life of the wife*, in lands to which the section applies.

By s. 5 of 47 Vict., c. 19 (now R.S.O., c. 132, s. 7) the *jus disponendi* was given to the married woman, and by it lands acquired by her after the 1st July, 1884, became her separate estate.

The amendment made by s. 22 of 47 Vict., c. 19 (now embodied in R.S.O., c. 134, s. 3), enabled the married woman to dispose of her real estate without regard to the date of her marriage or of the acquisition of the property; but under it she can convey her own estate only, and not any estate to which her husband may be entitled by the curtesy after her death; while under s. 7 of c. 132 she can convey free from his estate by the curtesy.

Where a woman, married in 1869, acquired by conveyances from strangers lands in Etobicoke in 1879 and 1882, and lands in Parkdale in March, 1887, and was in the lifetime of her husband sued upon promissory notes made after March, 1887,

Held, that all the lands were her separate estate liable for her debts; but the Etobicoke lands were subject to the possible right of her husband to hold them after her death for his life, in case he survived her, as tenant by the curtesy, and that subject to this possible estate of her husband they were liable to be seized and sold for the satisfaction of the plaintiff's claim.

J. R. Roaf for the plaintiff.

E. D. Armour, Q.C., for the defendants.

Chancery Division.

FERGUSON, J.] [February 17.

RE WILSON AND HOUSTON.

Vendor and purchaser—Conditions of sale—Taxes due up to time of sale—Who to pay.

A mortgagee under two mortgages sold the land under the power of sale in the second mortgage, and by his conditions of sale stipulated amongst other things that he was selling merely all his estate or interest under the second mortgage, subject to the first and interest; that if second mortgage was taken for part of the purchase money it should be a first claim after the first mortgage and interest; that if no objection were made within a certain time, vendor's title to be held good and accepted by purchaser and vendor entitled to the consideration, and that the first mortgage could be paid off.

Held, that the taxes due up to the date of the sale should be paid by the vendor.

E. D. Armour, Q.C., for the vendor.

W. M. Douglas for the purchaser.

Full Court.] [February 18.

HALL *v.* HALL.

Donatio mortis causâ—Delivery of keys of box and rooms containing valuables.

Decision of ROSE, J., reported 20 O.R. 168, reversed.

Per FERGUSON, J. I have seen no case in which the gift and delivery of the keys have been held a good gift *mortis causâ* of the property, and it appears to me that what is meant by the cases in which the delivery of the key is held sufficient is this, that where the words of the gift reach the property itself; in other words when the property is, without doubt, the subject of the gift according to the words of gift, and then, instead of delivering the property, the key of the trunk or box, in which it was delivered, this may do.

Bicknell for the defendants (appellants).

Holman for the plaintiff.

ROBERTSON, J.] [February 26.

MITCHELL *v.* LISTER.

Partnership agreement—Receiver—Failure of partners to agree as contemplated by articles.

An agreement of partnership contained the ollowing clause: "That at the expiration of

this co-partnership the parties hereto shall appoint some fit and proper person to get in all outstanding accounts, and to settle and adjust the partnership concerns."

The co-partnership had become determined by notice under the articles, but the partners could not agree upon a fit and proper person to act under the above clause.

One of the partners now moved for an order appointing a receiver.

Order made that unless the parties could agree within three days one of themselves should act as receiver, C.M. should be appointed as such.

Worrell, Q.C., for the motion.

Armour, Q.C., contra.

BOYD, C.] [March 17.

RE LYNN.

LYNN *v.* THE TORONTO GENERAL TRUSTS COMPANY.

Will—Devise—Insurance certificate or policy—Declaration under R.S.O., c. 136, s. 5.

A testator by his will devised an insurance certificate or policy to the defendants as his executors, for the benefit of his wife and children.

Held, that the will was a sufficient declaration under R.S.O., c. 136, s. 5, and that creditors were not entitled to the proceeds.

Huson W. M. Murray, Q.C., for the creditors.

E. T. Malone for the executors contra.

Practice.

Q.B. Div'l Court.] [March 6.

MEYER RUBBER CO. *v.* RICH.

Arrest—Intent to leave Ontario—Intent to defraud creditors.

The defendants left the State of Pennsylvania and came to Ontario with the intent of defrauding their creditors. They stayed some time in London, Ontario, and left there with their wives, by train, booked for Toronto. One of their creditors left London by the same train, and while on the train, between London and Hamilton, he heard one of the wives say to her husband that she wondered what time they should reach Montreal. While waiting at Hamilton for the Toronto train, the creditor obtained an order for the defendants' arrest, and they were there arrested.

Held, upon the evidence, that the defendants intended to leave Ontario with the intent of defrauding their creditors.

Per ARMOUR, C.J., and FALCONBRIDGE, J.: That the defendants having come into Ontario with the intent of defrauding their creditors, and their intention being to pass through it, they must be held to have been quitting Ontario with intent to defraud their creditors.

Per STREET, J. That the mere fact of the defendants having absconded to this province to defraud their creditors elsewhere did not afford any evidence of their intention to abscond from this province to defraud the same creditors, so as to justify an order for their arrest upon their arrival here; but the circumstances of the case led to the conclusion that the defendants were about to leave the province.

Robinson, Q.C., and *C. J. Holman*, for the plaintiffs.

Osler, Q.C., and *Teetzel*, Q.C., for the defendants.

C.P. Div'l Court.] [March 6.

SCRIPTURE *v.* REILLY.

Third party—Rules 329, 332—Landlord and tenant—Covenant for quiet enjoyment—Order dismissing third party from action.

The plaintiff and defendant occupied adjoining shops under leases from the same landlord, the plaintiff having the prior lease. The plaintiff brought this action to restrain the defendant from obstructing his light and view; and the defendant served a third party notice upon the landlord, claiming, under a covenant for quiet enjoyment, to be protected against the plaintiff's claim.

Held, that the defendant could not call upon his landlord to defend him against an unfounded claim; but if the plaintiff's claim was well founded, it was by reason of an easement expressly or impliedly granted by his lease, and the defendant took subject to such easement, and could not claim that the landlord covenanted with him for quiet enjoyment of that which did not pass under his lease; and, therefore, whether the plaintiff's claim was well or ill-founded, the landlord was not a proper party to be called on for indemnity under Rule 329.

Thomas v. *Owen*, 20 Q.B.D. 225, followed.

Held, also, that upon a motion by the defendant under Rule 332 for directions as to the mode of trial, where a third party had been

notified under Rule 329, it was proper to make an order dismissing the third party from the action, without any motion on his part.

A. Hoskin, Q.C., for the plaintiff.

W. N. Miller, Q.C., for the defendant.

Shepley, Q.C., for the third party.

Q.B. Div'l. Court.] [March 6.

CATTON *v.* GLEASON.

Discovery—Particulars—Slander of title to goods—Damping auction sale.

In an action for slander of title to goods, the statement of special damage was that by reason of the utterances of the defendant to a crowd of persons assembled at an auction sale which he had advertised a large number of them withdrew from it, and the goods which were sold at it brought less money than they would otherwise have done.

Held, that the plaintiff should not be required to give particulars of the names of the persons who would have given for each article, in respect of which damage was claimed, a larger price than was realized at the sale; all that he could reasonably be required to particularize was the amount to which his sale had been damped.

Roswell for the plaintiff.

Bristol for the defendant.

BOYD, C.] [March 7.

IN RE ROSS AND STOBIL.

Costs—Land Titles Act, R.S.O., c. 116, ss. 74, 127, 137; Rule 16 (2)—Powers of local Master of Titles—Costs as between solicitor and client—Costs as of a court motion—Discretion—Appeal late.

A local Master of Titles has power by virtue of ss. 137 and 74 of the Land Titles Act, R.S.O., c. 116, in ordering that a caution be vacated, to direct payment by the cautioner of costs as between solicitor and client; and by Rule 16 (2) of the rules in the schedule to the Act has power to give a special direction that costs as of a court motion may be taxed.

And where a Master in his discretion so ordered, a Judge in Chambers refused to interfere, more especially as the appeal was late and could only be entertained as an indulgence.

Masten for the cautioner.

W. M. Douglas for the registered owner.

FERGUSON, J.] [March 25.

ABELL *v.* MORRISON.

Leave to appeal—Extending time—Justice of the case—Undisputed facts—Discretion—Reversing previous order.

Upon an application to extend the time for an appeal to do justice in the particular case is above all other considerations; and the expression "the justice of the case" means the justice of the case upon the undisputed facts of it.

And where the plaintiff desiring to appeal to the Court of Appeal from the judgment of the Chancery Divisional Court, 19 O.R. 669, was two months and twelve days late in filing his appeal bond, and offered no sufficient excuse for his delay, but asked to have the time extended as an indulgence, and it appeared that if the plaintiff were to succeed in his contention in the case he would obtain and have at the expense of the defendant more than he could have had under his contract,

Held, that the justice of the case was against the plaintiff; and that an order of the Master in Chambers extending the time for appealing, though a discretionary order, was so clearly wrong that it should be reversed.

Langton, Q.C., for the plaintiff.

Aylesworth, Q.C., for the defendant, G. Morrison.

Chy. Div'l Court.] [March 26.

IN RE BLAIR.

Infants—Past maintenance—Discretion—Special circumstances.

Applications for past maintenance of infants rest in the discretion of the court.

Where the infants' brother-in-law, a farmer, had lodged and fed them, but expended nothing for their clothes or education, during a period of two years and a half previous to applying for maintenance, knowing all the time that they were entitled to money in court, and a Judge in Chambers refused to allow anything for past maintenance, but made a more liberal allowance for the future than he would otherwise have done,

Held, that, dealing with the case on its special circumstances and having regard to the discretion exercised, the Judge's order should not be disturbed.

W. H. Blake for the applicant.

J. Hoskin, Q.C., for the infants.

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(Compiled for THE CANADA LAW JOURNAL.)

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Law Society of Upper Canada.

THE LAW SCHOOL, 1891.

LEGAL EDUCATION COMMITTEE.

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This notice is designed to afford necessary information to Students-at-Law and Articled Clerks, and those intending to become such, in regard to their course of study and examinations. They are, however, also recommended to read carefully in connection herewith the Rules of the Law Society which came into force June 25th, 1889, and September 21st, 1889, respectively, copies of which may be obtained from the Secretary of the Society, or from the Principal of the Law School.

Those Students-at-Law and Articled Clerks, who, under the Rules, are required to attend the Law School during all the three terms of the School Course, will pass all their examinations in the School, and are governed by the School Curriculum only. Those who are entirely exempt from attendance in the School will pass all their examinations under the existing Curriculum of The Law Society Examinations as heretofore. Those who are required to attend the School during one term or two terms only will pass the School Examination for such term or terms, and their other Examination or Examinations at the usual Law Society Examinations under the existing Curriculum.

Provision will be made for Law Society Examinations under the existing Curriculum as formerly for those students and clerks who are wholly or partially exempt from attendance in the Law School.

Each Curriculum is therefore published herein accompanied by those directions which appear to be most necessary for the guidance of the student.

CURRICULUM OF THE LAW SCHOOL, OSGOODE HALL, TORONTO.

Principal, W. A. REEVE, Q.C.

Lecturers: E. D. ARMOUR, Q.C.; A. H. MARSH, B.A., LL.B., Q.C.; R. E. KINGSFORD, M.A., LL.B.; P. H. DRAYTON.

The School is established by the Law Society of Upper Canada, under the provisions of rules passed by the Society with the assent of the Visitors.

Its purpose is to promote legal education by affording instruction in law and legal subjects to all Students entering the Law Society.

The course in the School is a three years course. The term commences on the fourth Monday in September and closes on the first Monday in May; with a vacation commencing on the Saturday before Christmas and ending on the Saturday after New Year's Day.

Students before entering the School must have been admitted upon the books of the Law Society as Students-at-Law or Articled Clerks. The steps required to procure such admission are provided for by the rules of the Society, numbers 126 to 141 inclusive.

The School term, if duly attended by a Student-at-Law or Articled Clerk is allowed as part of the term of attendance in a Barrister's chambers or service under articles.

The Law School examinations at the close of the School term, which inc ude the work of the first and second years of the School course respectively, constitute the First and Second Intermediate Examinations respectively, which by the rules of the Law Society, each student and articled clerk is required to pass during his course; and the School examination which includes the work of the third year of the School course, constitutes the examination for Call to the Bar, and admission as a Solicitor.

Honors, Scholarships, and Medals are awarded in connection with these examinations. Three Scholarships, one of $100, one of $60, and one of $40, are offered for competition in connection with each of the first and second year's examinations, and one gold medal, one silver medal, and one bronze medal in connection with the third year's examination, as provided by rules 196 to 205, both inclusive.

The following Students-at-Law and Articled Clerks are exempt from attendance at the School.

1. All Students-at-Law and Articled Clerks attending in a Barrister's chambers or serving under articles elsewhere than in Toronto, and who were admitted prior to Hilary Term, 1889.

2. All graduates who on the 25th day of June, 1889, had entered upon the *second* year of their course as Students-at-Law or Articled Clerks.

3. All non-graduates who at that date had entered upon the *fourth* year of their course as Students-at-Law or Articled Clerks.

In regard to all other Students-at-Law and Articled Clerks, attendance at the School for one or more terms is compulsory as provided by the Rules numbers 155 to 166 inclusive.

Any Student-at-Law or Articled Clerk may attend any term in the School upon payment of the prescribed fees.

Students and clerks who are exempt, either in whole or in part, from attendance at The Law School, may elect to attend the School, and to pass the School examinations, in lieu of those under the existing Law Society Curriculum. Such election shall be in writing, and, after making it, the Student or Clerk will be bound to attend the lectures, and pass the School examination as if originally required by the rules to do so.

A Student or Clerk who is required to attend the School during one term only, will attend during that term which ends in the last year of his period of attendance in a Barrister's Chambers or Service under Articles, and will be entitled to present himself for his final examination at the close of such term in May, although his period of attendance in Chambers or Service under Articles may not have expired. In like manner those who are required to attend during two terms, or three terms, will attend during those terms which end in the last two, or the last three years respectively of their period of attendance, or Service, as the case may be.

Every Student-at-Law and Articled Clerk before being allowed to attend the School, must present to the Principal a certificate of the Secretary of the Law Society shewing that he has been duly admitted upon the books of the Society, and that he has paid the prescribed fee for the term.

The Course during each term embraces lectures, recitations, discussions, and other oral

methods of instruction, and the holding of moot courts under the supervision of the Principal and Lecturers.

During his attendance in the School, the Student is recommended and encouraged to devote the time not occupied in attendance upon lectures, recitations, discussions or moot courts, in the reading and study of the books and subjects prescribed for or dealt with in the course upon which he is in attendance. As far as practicable, Students will be provided with room and the use of books for this purpose.

The subjects and text-books for lectures and examinations are those set forth in the following Curriculum :

FIRST YEAR.

Contracts.

Smith on Contracts.
Anson on Contracts.

Real Property.

Williams on Real Property, Leith's edition.

Common Law.

Broom's Common Law.
Kerr's Student's Blackstone, books 1 and 3

Equity.

Snell's Principles of Equity.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

SECOND YEAR.

Criminal Law.

Kerr's Student's Blackstone, Book 4.
Harris's Principles of Criminal Law.

Real Property.

Kerr's Student's Blackstone, Book 2.
Leith & Smith's Blackstone.
Deane's Principles of Conveyancing.

Personal Property.

Williams on Personal Property.

Contracts and Torts.

Leake on Contracts.
Bigelow on Torts—English Edition.

Equity.

H. A. Smith's Principles of Equity.

Evidence.

Powell on Evidence.

Canadian Constitutional History and Law.

Bourinot's Manual of the Constitutional History of Canada. O'Sullivan's Government in Canada.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to the above subjects as shall be prescribed by the Principal.

THIRD YEAR.

Contracts.

Leake on Contracts.

Real Property.

Dart on Vendors and Purchasers.
Hawkins on Wills.
Armour on Titles.

Criminal Law.

Harris's Principles of Criminal Law.
Criminal Statutes of Canada.

Equity.

Lewin on Trusts.

Torts.

Pollock on Torts.
Smith on Negligence, 2nd edition

Evidence.

Best on Evidence.

Commercial Law.

Benjamin on Sales.
Smith's Mercantile Law.
Chalmers on Bills.

Private International Law.

Westlake's Private International Law.

Construction and Operation of Statutes.

Hardcastle's Construction and Effect of Statutory Law.

Canadian Constitutional Law.

British North America Act and cases thereunder.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

During the School term of 1890-91, the hours of lectures will be 9 a.m., 3.30 p.m., and 4.30 p.m., each lecture occupying one hour, and two lectures being delivered at each of the above hours.

Friday of each week will be devoted exclusively to Moot Courts. Two of these Courts will be held every Friday at 3.30 p.m., one for the Second year Students, and the other for the Third year Students. The First year Students will be required to attend, and may be allowed to take part in one or other of these Moot Courts.

Printed programmes showing the dates and hours of all the lectures throughout the term, will be furnished to the Students at the commencement of the term.

GENERAL PROVISIONS.

The term lecture where used alone is intended to include discussions, recitations by, and oral examinations of, students from day to day, which exercises are designed to be prominent features of the mode of instruction.

The statutes prescribed will be included in and dealt with by the lectures on those subjects which they affect respectively.

The Moot Courts will be presided over by the Principal or the Lecturer whose series of lectures is in progress at the time in the year for which the Moot Court is held. The case to be argued will be stated by the Principal or Lecturer who is to preside, and shall be upon the subject of his lectures then in progress, and two students on each side of the case will be appointed by him to argue it, of which notice will be given at least one week before the argument. The decision of the Chairman will be pronounced at the next Moot Court, if not given at the close of the argument.

At each lecture and Moot Court the roll will be called and the attendance of students noted, of which a record will be faithfully kept.

At the close of each term the Principal will certify to the Legal Education Committee the names of those students who appear by the record to have duly attended the lectures of that term. No student will be certified as having duly attended the lectures unless he has attended at least five-sixths of the aggregate number of lectures, and at least four-fifths of the number of lectures of each series during the term, and pertaining to his year. If any student who has failed to attend the required number of lectures satisfies the Principal that such failure has been due to illness or other good cause, the Principal will make a special report upon the matter to the Legal Education Committee. For the purpose of this provision the word "lectures" shall be taken to include Moot Courts.

Examinations will be held immediately after the close of the term upon the subjects and text books embraced in the Curriculum for that term.

The percentage of marks which must be obtained in order to pass any of such examinations is 55 per cent. of the aggregate number of marks obtainable, and 29 per cent. of the marks obtainable on each paper.

Examinations will also take place in the week commencing with the first Monday in September for students who were not entitled to present themselves for the earlier examination, or who having presented themselves thereat, failed in whole or in part.

Students whose attendance at lectures has been allowed as sufficient, and who have failed at the May examinations, may present themselves at the September examinations at their own option, either in all the subjects, or in those subjects only in which they failed to obtain 55 per cent. of the marks obtainable in such subjects. Students desiring to present themselves at the September examinations must give notice in writing to the Secretary of the Law Society, at least two weeks prior to the time fixed for such examinations, of their intention to present themselves, stating whether they intend to present themselves in all the subjects, or in those only in which they failed to obtain 55 per cent. of the marks obtainable, mentioning the names of such subjects.

Students are required to complete the course and pass the examination in the first term in which they are required to attend before being permitted to enter upon the course of the next term.

Upon passing all the examinations required of him in the School, a Student-at-Law or Articled Clerk having observed the requirements of the Society's Rules in other respects, becomes entitled to be called to the Bar or admitted to practise as a Solicitor without any further examination.

The fee for attendance for each Term of the Course is the sum of $10, payable in advance to the Secretary.

Further information can be obtained either personally or by mail from the Principal, whose office is at Osgoode Hall, Toronto, Ontario.

The Canada Law Journal.

VOL. XXVII. MAY 1, 1891. No. 8.

MR. JUSTICE STEPHEN, whose mental affliction has given rise to much unfavorable comment in the English newspapers, has resigned his position and retired from the Bench. The complications which his continued presence there would have created have thus happily been avoided. The learned judge's retirement was made the occasion of an affecting demonstration by both the bench and the bar, and he himself is said to have been reduced to tears. In the palmy days of his career he made a name in the profession which will be enduring, and he will be known to posterity, notwithstanding the circumstances which have led to his retirement, as a lawyer of profound learning and great mental grasp, and as one of the ablest among the many able men who have been his contemporaries.

A RECENT case *(Fonner* v. *Smith)* decided in the Supreme Court of Nebraska recognizes the right of a checkholder to sue the bank on which the check is drawn when payment is refused. *The Banking Law Journal*, in commenting on it, remarks: "What is the holder's right to the fund, for example, where the drawer has failed and the deposit passed into the hands of an assignee or receiver before presentment? Has he any preference in payment? Or, where the fund has been seized by an attaching creditor of the depositor? And again, has he any remedy against the bank if it refuses to pay the check, or must he look to the drawer or indorsers alone? These questions all involve an inquiry regarding the extent to which the check will be deemed an assignment of the fund called for.

"The United States Supreme Court, New York, and many other States, hold that a checkholder of an unaccepted check cannot sue the bank for refusal to pay, and various reasons are advanced in support. Among others, no privity of contract between bank and holder. On the other hand, the great commercial State of Illinois, as well as many other States, the latest Nebraska, announce that there is such a right of action. As stated by the Supreme Court of the latter State, the check is in effect an assignment of the amount to the holder, and the bank, by receiving the deposit, has impliedly promised to pay him on presentation. . . One point only will be dwelt upon, regarding the drawer's right of revocation after issue of the check under the law of Nebraska as just announced. We are uninformed whether it has been customary heretofore for bankers in Nebraska to regard themselves, before certification of a check, as responsible to the drawer solely, and under no obligation nor liability to the holder concerning payment. Assuming that such has been the custom or understanding, at least

in some instances, the decision in the present case furnishes Nebraska bankers with a new rule of liability, namely, that if they are in funds, they must pay the drawer's check on presentation, and are directly liable to the holder for the amount on refusal. But this much being clear, how is it with regard to the drawer's right of revocation of the check? Undoubtedly the custom heretofore has been to obey his mandate to stop payment, unless certification had been previously accorded. Now the decision clearly deprives him of this right after the check has been presented. The important practical question is whether he can countermand before presentment. . . . . The view which generally prevails even, we believe, in the States which hold, as has the Nebraska court, that a check assigns the amount to the holder and renders the bank liable to him on presentment, is that before presentment the drawer may countermand. Until presentment, the bank is not chargeable with the assignment. The holder of a check subsequently drawn but first presented gets the money where not enough for both. And it is plain to be seen that the drawer practically retains control of the fund before the check is presented. It is within his power to draw it all out on his own check. So controlling the deposit by ability to draw it out, why should not his right extend to control it by countermand order before the bank has been charged with liability for the amount to the checkholder by presentation of the check? And if this is the generally prevailing view, why should it not be deemed the view of the Nebraska court? What raises a doubt on the point is this: An examination of the Nebraska decision discloses the fact that the court, in announcing the rule that the checkholder may sue the bank on refusal, heads its list of supporting authority with the decisions of the Illinois courts. Illinois, we believe, stands alone as the only State wherein it has been decided that the drawer cannot countermand his check *before* presentment, when in the hands of a *bonâ-fide* holder. The case in which it is so decided, *Union National Bank* v. *Oceana County Bank*, 80 Ill. 212, will be briefly noted. The action was by the holder of a check, which the bank had refused to pay, although in funds, because prior to presentation the drawer had ordered the bank not to pay. The court held the bank liable, saying: 'After the check has passed to the hands of a *bonâ-fide* holder, it is not in the power of the drawer to countermand the order of payment.' Now the Nebraska Supreme Court cites this decision, with numerous others, from the State of Illinois, in support of its own conclusion, and the inference is certainly suggested that the intention is to adopt the Illinois line of judicial thought, governing the relation of drawer, holder, and bank in its entirety. This, with the court's own language—'And after notice to the bank of the drawing the check, the funds thus appropriated cannot be withdrawn by the drawer'—is the only foundation we have for the view that the intention may have been to deprive the drawer of the right of countermand *before* presentment. 'After notice to the bank of the drawing.' Does the court mean 'after presentment by the holder?'—for this in general would be the only means of giving notice to the bank. The Illinois decision cited only denies the right of countermand where the holder is a *bonâ-fide* one. If the drawer could show to the contrary, the right to stop payment would, of course, still exist. But regarding the

right in general, after execution and delivery to a *bonâ-fide* holder, in view of the citation by the Nebraska court of the Illinois decisions—although, it is true, not on the special point of revocation—and its ambiguous language regarding *notice* to the bank of the drawing, as shutting off the drawer's right of control, it is a difficult matter to say that the court did not intend to follow the view of the Supreme Court of Illinois in *Union National Bank* v. *Oceana County Bank*, above cited."

WE have received from Sir J. S. Winter, Q.C., the leading counsel for the plaintiff in the case of *James Baird and another* v. *Sir Baldwin Walker, Bart.*, a copy of *The Evening Herald*, of St. John's, Newfoundland, for the 30th March last, containing the judgment of the Supreme Court of that island, delivered by Mr. Justice Sir Robert Pinsent, on the 18th of that month, in this important case, with an expression of his belief that we might consider it, as we certainly do, of sufficient interest to give it some notice in our journal. The report is too long for insertion in full, but we copy and insert the statement of the case, and the conclusion to which the Court came, that the jurisdiction of the municipal courts of the place where the cause of action arose was not excluded by the fact that the trespass complained of was committed under the authority of the *modus vivendi* alleged by the defendant, in effect—that an agreement between the British Government and that of a foreign country cannot be enforced against or affect the rights or property of a British subject, unless sanctioned by an Act of the British Parliament or of the legislature of the colony or place where such rights or property exist; in which opinion we humbly concur, as we do in the confidence the court expresses, that inquiry and compensation to those who have suffered loss will follow, and that further litigation in the case will be found unnecessary.

In his judgment Sir Robert Pinsent says: "The statement of claim in this action charges the defendant with having, in June last, wrongfully entered the plaintiffs' messuage and premises, situate at Fishel's River, in Bay St. George, and with taking and retaining possession of the plaintiff's lobster factory, and of a large quantity of gear, materials and implements appertaining to the same, and with having prevented the plaintiffs from carrying on the business of catching and preserving lobsters; and the plaintiffs claim $5,000 damages, and they pray for an injunction. The defendant, amongst other matters, pleads in effect that he was captain of one of Her Majesty's ships employed during the last season on the Newfoundland fisheries, and was senior officer on the station; that the Lords Commissioners of the Admiralty, by command of Her Majesty, committed to him 'the care and charge of putting in force and giving effect to an agreement embodied in a *modus vivendi* for the lobster fishery in Newfoundland during the said season, which as an act and matter of state and public policy had been by Her Majesty entered into with the Government of the Republic of France.' That the said agreement provided, amongst other things, 'that on the coast of Newfoundland, where the French enjoy rights of fishing, conferred by the treaties, no lobster factories which were not in operation on the first day of July, 1889, should be permitted unless by the joint consent of the commanders

of the British and French naval stations.' The plea then proceeds to allege that the said lobster factory of the plaintiffs was in operation in contravention of the terms of that agreement, and that after notice to the plaintiffs, which they disregarded, he (the defendant) 'in his public political capacity, and in the exercise of the powers and authorities, and in the performance of the duties of the care and charge so as aforesaid committed to him,' entered and took possession, etc., but that the alleged trespasses 'were acts and matters of state, done and performed under the provisions of the said *modus vivendi*.' And the defendant sets out that all he had done was with a full knowledge of the circumstances, approved and confirmed by Her Majesty, and he concludes his plea in these words—'and the defendant therefore submits that the matters set forth in his answer to the said statement of claim, and on which he rests his right to enter into and take possession of the said messuage and premises, and to take possession of the said gear, materials and implements, were acts and matters of state arising out of the political relations between Her Majesty the Queen and the Government of the Republic of France; that they involve the construction of treaties and of the said *modus vivendi* and other acts of state, and are matters which cannot be enquired into by this honorable court.' It is admitted that if this plea can be sustained as a matter of fact, and if it be good in law, there will be an end to this action. It is assumed that the plaintiffs are British subjects, and it is hardly necessary to add that for the purposes of the present discussion the right of property in the plaintiffs in the lands and chattels, the subject of the alleged trespasses, and the acts of trespass themselves must be taken as admitted. The reply of the plaintiffs to this plea or statement of defence, besides raising issues upon questions of fact, with which we have at present no concern, avers that 'the alleged contravention of said agreement or *modus vivendi* afforded no justification in law for the action of the defendant'; 'that the said action of the defendant was not an act of state and public policy'; 'that the alleged authority from Her Majesty, and subsequent confirmation by her, afford no justification for the action of the defendant,' and do not relieve the defendant from liability for his said acts."

The judge then repeats the admission that if the plea of the defendant is sustained in fact and good in law there is an end of the case; and he then examines the authorities, comments on them, and gives this reason for holding them irrelevant, and concludes as follows:

"To sum up in short terms, for general information, our conclusion upon the issue before us, the court holds: That in an action of this description, to which the parties are British subjects, for a trespass committed within British territory in time of peace, it is no sufficient answer to say, in exclusion of the jurisdiction of the municipal courts, that the trespass was an 'act of state' committed under the authority of an agreement or *modus vivendi* with a foreign power. That in such a case, as between the Queen's subjects, the questions of the validity, interpretation and effect of all instruments and evidences of title and authority rest in the first place with the courts of competent jurisdiction within which the cause of action arises. That, therefore, the decision upon the present issue, which is confined to these points, is found in favor of the

plaintiffs in this action, with leave to the defendant (should it be desired) to amend upon payment of costs. At the bar we had the voluntary statement of the Attorney-General, on the part of the defendant, to uphold the 'legal and constitutional rights of the Crown,' that with regard to those who had suffered loss, there could not be the the remotest doubt but that inquiry would be made and that compensation would follow. It is to be hoped, therefore, that it will be found unnecessary to prolong the litigation in the present case."

PRIORITIES UNDER REGISTRY ACT.

The writer of the observations on the cases of *Brown* v. *McLean* and *Abell* v. *Morrison*, to which we referred *ante* p. 98, has discarded his *nom de plume*, and in the April number of the *Canadian Law Times* has again returned to the charge. It is perhaps not surprising to find that we have failed to convince him of the soundness of those decisions, when the reasons assigned by the Court failed to do so. Perhaps he will excuse us for saying that he also has equally failed to convince us that the position which we took is erroneous. He considers that the principle of resulting trust cannot be invoked to support the decisions (1) because the transaction was a loan, and for this he cites two passages from text-writers, and (2) because "resulting trusts arise, in such cases as the present, only by the intention of the parties." We may observe that the first reason assigned is somewhat inconsistent with the second, for while reason No. 1 broadly asserts that a resulting trust cannot arise at all in the case of a loan, reason No. 2 admits that it may arise in cases of loans, but depends on the intention of the parties.

As regards the first reason, and the passages from the text-books, we may observe that the latter do not really cover the ground for which they are cited. It has not been alleged that if A. lends B. money, and B., without any bargain or stipulation of any kind with A. as to the use he is to apply it to, lays it out in the purchase of land or payment of incumbrances, there is any resulting trust in favor of A. The proposition that is made is quite different from this. A. lends money to B. with the express stipulation that it is to be applied in payment of incumbrances, and on the clear understanding that the payment is to be for A.'s benefit and not for B.'s. We do not think the passages from the text-books can be construed to mean that in such a case as that no resulting trust can arise. To suppose that B. could receive the money and procure the mortgage estate to be reconveyed to him and hold the property discharged therefrom as against A., seems to us a proposition so contrary to natural justice that we confess that it is with some surprise that we learn that it is even considered open to argument. In *Brown* v. *McLean*, as we pointed out formerly, and established, we think, by reference to decisions, the rights of the execution creditor depended on the rights of his execution debtor; this position is but faintly attacked. The real question, we maintain, in that case therefore was: Could the execution debtor be heard to say that he was entitled to hold the property discharged from the mortgages? If he could not, as we think he manifestly could not, then it is idle to say that

his execution creditor had any right to do so. If he had, how does his right arise? What statute, or principle of law gives him any such right? It is assumed that the appearance of the title on the registry books is necessarily conclusive in favor of the execution creditor, but we do not find anything in the Registry Act or any other Act that makes it so, and the decisions we formerly referred to show that it is not. The execution creditor's rights are not regulated by what his debtor's rights appear to be, but by what they actually are. Of course, after the execution is placed in the sheriff's hands, we do not pretend to say that the debtor can part with the actual interest he then has to the prejudice of the execution creditor. In the case of lands, the writ binds whatever interest the debtor actually has at the time it is delivered to the sheriff, and a purchaser from the debtor after the delivery of the writ to the sheriff takes subject to the right of the execution creditor to sell under the writ: *Doe d. Macpherson* v. *Hunter*, 4 U.C.R. 449.

As regards the second reason, the intention which is supposed to be wanting in the cases of *Brown* v. *McLean* and *Abell* v. *Morrison* seems really to have been present. It is quite clear that the intention of the parties in paying off the incumbrances was that the payment should inure to the benefit of the parties advancing the money. The intention of the parties is in very few cases of a resulting trust an express intention that a resulting trust should arise. The resulting trust is called into being by equity, to give effect not to an express but a presumed intention that the person for whose benefit it is invoked was to have the benefit of the deed or conveyance in respect of which it is invoked. That, we apprehend, is the only kind of intention that is necessary, if any at all be necessary, in order to create a resulting trust. There would be very few cases of resulting trust if they only arose in those cases in which the parties expressly intended there should be a resulting trust. But the intention of the parties in *Brown* v. *McLean* and *Abell* v. *Morrison*, who advanced the money to pay off the incumbrances, was clearly that they were to have the benefit of the payment and not the mortgagor, nor his creditors, nor *puisne* incumbrancers, and it seems to us that that is quite a sufficient intention to give rise to a resulting trust in their avor. *Standing* v. *Bowring*, 31 Ch. D. 282 (*ante* vol. 22, p. 115), which is referred to, seems to us quite beside the question; that was a case of a completed gift which the Court refused to set aside in favor of the donor. In the cases of *Brown* v. *McLean* or *Abell* v. *Morrison*, there is no contention that the advances to pay off the incumbrances were intended as gifts.

It is argued that the Court in those cases was asked to take away some rights which the execution creditor in *Brown* v. *McLean*, and the plaintiff in *Abell* v. *Morrison*, had actually acquired, but this is clearly an erroneous way of stating the question. The Court was not asked in either case to take away any rights, but to declare whether or not any had ever been acquired as against the parties paying off the incumbrances; and what the Court did was not to take away any rights, but to declare that none had ever been acquired.

Great reliance is placed on the fact that a certificate of discharge embraces a statement that the mortgagor has satisfied the mortgage moneys, and that the mortgage is therefore discharged. But these statements are not conclusive; not-

withstanding them, there is no estoppel in favor of an execution creditor or registered lienholder to prevent the truth of the matter being shown, unless in the latter case he is in a position to aver that he took his security relying on the truth of such statements. And it is also argued that by the condition of the mortgage, if the money were paid at maturity, the mortgage would have been "null and void," without any discharge or reconveyance. But this argument is somewhat in the nature of "a speaking demurrer," inasmuch as it imports into the discussion a fact which does not appear on the record; but even if it did, it would have no weight, it appears to us; for even if the payment had in law the legal effect of putting an end to the mortgage, and revesting the estate in the mortgagor, the fact still remains that the mortgagor has not himself paid the money, but a third party, on the express understanding that the payment was to be for his, and not for the mortgagor's, benefit. Under such circumstances the legal right of the mortgagor is controlled by the equitable rights of the third party, and execution creditors of the mortgagor or subsequent incumbrancers standing in the position of the plaintiff in *Abell* v. *Morrison* could no more claim the benefit of the payment, nor of the estate by this means vested in the mortgagor, than they could have done if the mortgagee had reconveyed the estate to the mortgagor upon an express trust for the third party advancing the money to pay him off.

The writer in our contemporary is apparently oppressed with a very needless apprehension that the difficulties in the way of searching titles are increased by the decisions which he endeavors to controvert. We fail to see any ground for this apprehension, and it appears to us to spring from a misconception of the policy of the Registry Act and the effect of the decisions he complains of. In our former article on the subject, we endeavored to show that the aim of the Registry Act is to protect all persons dealing *bonâ fide* for value on the faith of the registered instruments. While as against an execution creditor, as in *Brown* v. *McLean*, or as against an incumbrancer, such as the plaintiff in *Abell* v. *Morrison*, who had not acquired their rights on the faith of the mortgages in question being discharged, it would be open to show that such mortgages, though appearing to be discharged, were in equity still subsisting charges, it does not at all follow that that could be done as against a purchaser or mortgagee who had acquired his rights on the faith that the registered certificates of discharge were actual and effectual discharges of the mortgages. As regards such persons, they are "subsequent incumbrancers," and within the express words of sec. 76 of the Registry Act. This is not saying that subsequent incumbrancers "are protected by the Act, and prior registered rights are not," as is alleged. Prior registered rights are protected by the Act, as against all unregistered incumbrances prior in point of time; but they are not entitled to gain any priority over prior registered incumbrances by virtue of the Registry Act merely by the blundering registration of some instrument erroneously purporting to discharge them. When it comes to be a question whether any such prior incumbrance has been discharged or not, as against a subsequent purchaser or mortgagee who acquired his rights while it still appeared in the Registry books as a subsisting charge,

we fail to see anything in the Registry Act to prevent the truth being shown and the rights of the parties adjusted according to the true state of the facts, whatever they may be, no matter what they may appear to be on the Registry books.

The view we expressed as to the construction of section 81 of the Registry Act apparently approves itself to the writer of the article in our contemporary, but he seems to think that adopting that construction and assuming that "the same party" referred to in that section means the party creating the equitable lien, which would in the *Abell* case be the mortgagees, yet still in *Abell* v. *Morrison* the section was contravened, inasmuch as the equitable lien was there set up against the registered discharges. We confess that this does seem to us a fair objection; but we are disposed to think that the answer to it is, that the equitable lien was there set up not against, but by virtue of the registered discharges, for, as the editor of the *Canadian Law Times* points out in the same number, at p. 110, the effect of a registered discharge is not necessarily to revest the estate in the mortgagor, but in the person best entitled to it (see R.S.O., c. 114, s. 69). But obviously section 81 was intended to meet quite a different state of facts to that in *Abell* v. *Morrison*. The principle of that section is the same as the rest of the Act, viz., to protect persons dealing with the land on the faith of the title being in fact as it is shown on the Registry books. It is intended to prevent prior equitable unregistered liens, etc., from being set up as against a subsequent registered purchaser or mortgagee claiming under the person who had created the equitable lien. The occasion of the section being enacted was the case of *Harrison* v. *Armour*, 11 Gr., 303, which indirectly furnishes a clue to its proper construction. In that case it was held that an equitable mortgage by deposit did not require registration, and was entitled to priority over a subsequent registered mortgage by the same mortgagor. In *Abell* v. *Morrison* the contest was between the plaintiff, a *puisne* incumbrancer, and a person claiming to stand in the shoes of a prior registered incumbrancer; and the substantial question was whether that prior incumbrance was still, notwithstanding the registration of an instrument purporting to discharge it, a subsisting charge by reason of the facts under which the discharge was obtained and registered. Even if in terms section 81 covered such a case, there are cases in which the Courts have refused to give effect to the literal wording of a statute, where to do so would work injustice, and have restricted its meaning; and this is one of the cases in which we believe that rule would be properly applied.

COMMENTS ON CURRENT ENGLISH DECISIONS.

The Law Reports for April comprise (1891) 1 Q.B., pp. 429-551; (1891) P., pp. 161-188; and (1891) 1 Ch., pp. 397-575.

APPRENTICE—APPRENTICESHIP DEED—DISHONESTY OF APPRENTICE—MASTER, EXONERATION OF—CONDITION PRECEDENT.

Learoyd v. *Brook* (1891), 1 Q.B. 431, involves a very simple question of law. The action was brought by the guardians of an apprentice to recover damages

for breach by the defendant, the master, of his covenants in an apprenticeship deed; or, in the alternative, to recover the whole or some part of the premium of £100. The apprentice had been detected in acts of dishonesty, and on the evidence the judge found he was an habitual thief; in consequence of his dishonesty, the defendant refused to continue him as his apprentice or keep, teach or maintain him as stipulated by the apprenticeship deed; and the simple question was whether the apprentice's dishonesty exonerated the defendant from liability under his covenant, and A. L. Smith, J., held that it did, and that the plaintiffs were therefore not entitled to either form of relief claimed by them.

CHEQUE—WORDS PROHIBITING TRANSFER—BILLS OF EXCHANGE ACT, 1882 (45 & 46 VICT., C. 61), SS. 8, 73, 76 (53 VICT., C. 33, SS. 8, 72, 75 (D.)).

National Bank v. *Silke* (1891), 1 Q.B. 435, is a case illustrating the law as to the effect of the system of crossing cheques, which has now been introduced into Canada under the Bills of Exchange Act (53 Vict., c. 33 (D.)). By section 8 of the Act it is provided that "when a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but it is not negotiable." The instrument in question was a cheque payable to the order of one Moriarty, and was crossed by the drawer with the words, "Account of Moriarty at the National Bank." Moriarty received the cheque and indorsed it to the National Bank, who placed the amount of it to his credit, and the amount placed to his credit was drawn against by Moriarty and his cheques honored. On the National Bank presenting the cheque in question for payment it was refused, the drawers having stopped payment on the ground that it had been obtained by false representations. The National Bank then brought the present action against the drawer, who set up as a defence that the words written across the face of the cheque had the effect of rendering it not negotiable, and therefore that the plaintiffs could not sue on it. The first question was whether s. 8 applied to cheques. It was contended that it did, because by s. 73 (s. 72 of our Act) a cheque is defined to be "a bill of exchange payable on demand." The Court of Appeal assumed without deciding that this was so, but held that, even if it were so, the cheque, being payable to order, could not be made "not negotiable" except by words plainly prohibiting transfer. The words used here the Court considered ambiguous, and only amounting to a direction to the plaintiffs to carry the amount when received to Moriarty's account; and they held also that the plaintiffs were holders for value and not mere agents of Moriarty to collect the amount for him.

PRACTICE—MOTION FOR NEW TRIAL—JURISDICTION OF COURT OF APPEAL TO ENTER JUDGMENT, INSTEAD OF GRANTING NEW TRIAL—ORD. lviii. r. 4 (ONT. RULE 755).

In *Allcock* v. *Hall* (1891), 1 Q.B. 444, notwithstanding the dictum of Lord Halsbury, L.C., to the contrary in *Millar* v. *Toulmin*, 12 App. Cas. 747, the Court of Appeal (Lindley, Lopes, and Kay, L.JJ.) held that on a motion for a new trial the Court might, if it should see fit, instead of granting a new trial direct judgment to be entered in favor of the party against whom the verdict at the trial

had been rendered. It was stated by Lindley, L.J., that this view was concurred in by the other branch of the Court. The wording of Ont. Rule 755 differs slightly from the English Rules 568 and 868, but appears even more explicitly in favor of the practice laid down by the present case.

PRACTICE—JOINT CONTRACTORS—JUDGMENT RECOVERED AGAINST ONE—SETTING ASIDE JUDGMENT AND ADDING CO-CONTRACTOR AS DEFENDANT—RES JUDICATA.

Hammond v. *Schofield* (1891), 1 Q.B. 453, brings to notice the important result which flows from taking a judgment against one of two joint contractors, namely —that although such judgment may have been signed in ignorance of the liability of the co-contractor, it cannot afterwards be set aside even by the consent of the defendant against whom it has been entered, in order to enable the plaintiff to join the other co-contractor. "The effect of the judgment was undoubtedly to destroy the right of action against a co-contractor with the defendant, *King* v. *Hoare*, 13 M.W. 494, even though the plaintiff did not know when he signed judgment that he had a remedy against him, *Kendall* v. *Hamilton*, 4 App. Cas. 504": per Wills, J. The Court (Wills and Vaughan Williams, JJ.) were of opinion that the judgment could not be set aside by consent to the prejudice of the co-contractor; and the order of Pollock, B., setting aside the judgment, was, therefore, on the appeal of the co-contractor, reversed.

STATUTE OF LIMITATIONS—21 JAC. I., C. 16—CONVERSION, DEMAND, AND REFUSAL—LEASE.

Miller v. *Dell* (1891), 1 Q.B. 468, was an action for detinue and conversion of an indenture of lease. The lease belonged to the plaintiff and was fraudulently taken from him by his son, and without the plaintiff's knowledge was deposited by the son with one Bates in 1881, as security for money lent by Bates to the son. Bates held the lease without knowledge of the fraud. He afterwards became bankrupt, and his trustee assigned the debt to the defendant and handed the lease over to him. The plaintiff subsequently and within six years before action demanded the lease from the defendant, and on his refusal to give it up brought the present action, to which the defendant pleaded the Statute of Limitations. This raised the interesting question whether the defendant was in a position to rely on the previous possession by Bates of the lease, as affording him any ground of defence under the statute. The Court of Appeal (Lord Esher, M.R., and Lopes and Kay, L.JJ.) were of opinion that the prior possession of Bates afforded no defence to the defendant, and that the statute only began to run in favor of the defendant from the time of the demand and refusal; they therefore reversed the decision of Charles, J., who had given judgment for the defendant.

DEFAMATION—SLANDER—PRIVILEGED OCCASION—MEETING OF POOR LAW GUARDIANS—PRESENCE OF REPORTERS AT MEETING.

In *Pittard* v. *Oliver* (1891), 1 Q.B. 474, the Court of Appeal (Lord Esher, M.R., Sir J. Hannen, and Fry, L.J.), affirming Mathew, J., decided that where defamatory words were spoken at a meeting of Poor Law Guardians, which

would be privileged if none but guardians were present, the occasion was none the less privileged because reporters for the press happened to be present at the meeting, it being the established practice of the board to admit the public to their meetings.

HUSBAND AND WIFE—SEPARATE ESTATE—DEATH OF WIFE—DEVOLUTION TO HUSBAND JURE MARITI—DEBTS OF WIFE—MARRIED WOMAN'S PROPERTY ACT, 1882 (45 & 46 VICT., C. 75), S.1, S-S. 3, S. 23—(R.S.O., C. 132, S. 3, S-S. 3, S. 22).

In *Surman* v. *Wharton* (1891), 1 Q.B. 491, a married woman being entitled to separate estate, consisting of leasehold property, after the commencement of the M.W.P. Act, 1882, borrowed money from the plaintiff. She died intestate, and her husband, without taking out administration, entered into possession of the leasehold property. This action was brought by the plaintiff against the husband to recover the money lent to the wife. It was contended on behalf of the defendant that the leasehold vested in the husband *jure mariti* without administration, free from liability for her debts; and if it did not so vest, he was wrongly sued, as he was not the legal personal representative of the wife, within the meaning of s. 23 (see R.S.O., c. 132, s. 22). Pollock, B., and Charles, J., although agreeing that the Married Woman's Property Act, 1882, did not alter the course of devolution, and that on the wife's death intestate her separate property passed to her husband *jure mariti* without administration, were nevertheless of the opinion that the husband so taking was her "legal personal representative" within the meaning of s. 23, and therefore that he was liable for the debt sued on to the extent of the separate property of his wife come to his hands. We may observe that there is a very important difference created between the English and Ontario Act by s. 23 of the latter Act, which in effect provides that where a married woman dies intestate, leaving a husband and children, her separate property is not to devolve on her husband alone, but is to be distributed between the husband and children in the same proportions as the personal property of a husband dying intestate is distributed between his wife and children. Whenever, therefore, this provision takes effect, it would seem that the husband would not, on his wife's death, take her separate property *jure mariti*, but administration would be necessary; and this fact it is necessary to bear in mind when considering the application of this case in reference to the Ontario Act. When the wife leaves no children, the husband in Ontario would appear to be entitled *jure mariti*, as in England.

STATUTE OF LIMITATIONS—CAUSE OF ACTION, ACCRUAL OF—CONTINUOUS DAMAGE—SUBSIDENCE OF LAND.

In *Crumbie* v. *Wallsend Local Board* (1891), 1 Q.B. 503, the Court of Appeal (Lord Esher, M.R., and Bowen and Fry, L.JJ.) were called on to apply the rule established by the House of Lords in *Darley Main Colliery Co.* v. *Mitchell*, 11 App. Cas. 127, regarding the application of Statutes of Limitations to cases of damage arising from subsidence of land. In this case an excavation had been made under a street by the authority of the defendants, a municipal body, for the purpose of laying a sewer; the excavation had not been properly filled in, and in

consequence subsidence of the plaintiff's land and injury to his houses thereon took place; the injury began more than six months before action, and went on at intervals down to the commencement of the action. The action was required to be brought within six months after the accrual of the cause of action, and the Court held that the further subsidence, which took place within the six months of the bringing action, constituted a distinct cause of action, and therefore that the action was in time.

HUSBAND AND WIFE—MARRIED WOMAN—SEPARATE PROPERTY—ACTION FOR TORT TO WIFE—JOINDER OF HUSBAND AS CO-PLAINTIFF IN ACTION FOR TORT TO WIFE, EFFECT OF—MARRIED WOMAN'S PROPERTY ACT, 1882 (45 & 46 VICT., C. 75), S. 1, S-S. 2, S. 5 (R.S.O., C. 132, S. 3, S-S. 2, S. 7).

Beasley v. *Roney* (1891), 1 Q.B. 509, was an action brought to recover damages for personal injuries to a married woman, in which her husband was joined with her as a co-plaintiff. The jury awarded damages to the wife, and also a sum to the husband for expenses, and the whole amount recovered was paid to their solicitor. These moneys were then attached to answer a debt owing by the husband; the wife objected that the damages awarded to her were her separate property, and therefore not liable to answer her husband's debt; and the Court (Pollock, B., and Charles, J.) so held, overruling the Judge of a County Court, who had decided in favor of the attaching creditor.

MASTER AND SERVANT—FALSE IMPRISONMENT BY SERVANT—IMPLIED AUTHORITY OF SERVANT, EVIDENCE OF—PUBLIC HOUSE—MANAGER OF BAR.

Abrahams v. *Deakin* (1891), 1 Q.B. 516, was an action for false imprisonment, under the following circumstances: The plaintiff, with a friend, went into the defendant's public house, and the friend tendered in payment of some refreshment a German gold ten-mark piece by mistake for a half-sovereign, and asked the bartender for change. Before giving the change the latter noticed the coin tendered was a foreign one, and gave it back to the plaintiff's friend, who then gave him a half-sovereign instead, and thereupon the bartender gave the change. The plaintiff and his friend then left the house, when a person acting as defendant's manager followed them and gave the plaintiff into custody on a charge of attempting to pass bad money. The jury found a verdict of £50 for the plaintiff, but on appeal to the Court of Appeal (Lord Esher, M.R., and Lopes and Kay, L.JJ.), the verdict and judgment were set aside, the Court holding that the defendant was not liable for the act of his servant, and that the manager had no implied authority by reason of his position to arrest the plaintiff, inasmuch as his master's property was no longer in danger, and the arrest was made only for the purpose of vindicating the law by punishing the plaintiff for a criminal offence, which he was supposed to have already committed. From the reasoning of the Court we gather that the decision might have been otherwise had the supposed bad money been actually accepted by the bartender, and the arrest made for the purpose of recovering the good money given in change.

DEFAMATION—LIBEL, PUBLICATION OF—LETTER COPIED BY CLERK—LETTER ADDRESSED TO FIRM—PRIVILEGED OCCASION.

Pullman v. *Hill* (1891), 1 Q.B. 524, was an action for libel in which two questions are discussed: first, whether the defamatory matter was privileged, and

second, whether there had been a publication. The libel complained of was contained in a letter written on behalf of the defendants, a limited company, to a firm of which the plaintiffs were two of the partners. The writer of the letter did not know that there were any other partners in the firm. The letter was dictated by the managing director of the defendants to a clerk, who took it down in shorthand, and then wrote it in full by means of a type-writing machine. The letter thus written was copied by an office boy in a copying-press. When it reached its destination it was opened in the ordinary course of business by a clerk of the firm, and was read by two other clerks. The occasion of the letter being written was a dispute as to the rental of a hoarding, and the defendants in the letter in question stated, "The builders state distinctly that you had no right to this money whatever, consequently it has been obtained from us by false pretences." Day, J., at the trial, decided in favor of the plaintiff on both questions, but the Court of Appeal (Lord Esher, M.R., and Lopes and Kay, L.JJ.) overruled him on both points. They held that the matter, being clearly libellous, was published when it was communicated to the typewriter in the first place, and again on being so sent as to be opened by the plaintiff's clerks, and that neither of these occasions were privileged. As Lord Esher puts it, the necessities or the luxuries of business cannot alter the law, and if a man wants to write another a defamatory letter and keep a copy of it, he must do it himself.

CONTRACT—PRINCIPAL AND AGENT—CONTRACT TO EMPLOY FOR A CERTAIN TIME—IMPOSSIBILITY OF PERFORMANCE—IMPLIED CONDITION.

Turner v. *Goldsmith* (1891), 1 Q.B. 544, was an appeal from a decision of Grantham, J. The plaintiff had entered into an agreement with the defendant to act as his agent for the sale of shirts and other goods manufactured by the defendant, of which patterns should be furnished by the defendant to the plaintiff; the employment was to be for five years, and the plaintiff was to be remunerated by a commission on sales. During the five years the defendant's factory was burnt down, and the defendant in consequence ceased to furnish the plaintiff with samples. The plaintiff sued for breach of contract; the jury gave a verdict for the plaintiff of £125, but Grantham, J., holding that there had been no breach of the contract, dismissed the action. The Court of Appeal (Lindley, Lopes and Kay, L.JJ.), however, were of opinion that the destruction of the defendant's factory did not excuse his non-performance of his part of the agreement, and that the plaintiff was entitled to substantial damages; but considering the verdict excessive, the plaintiff, on being put to his election to take a new trial or consent to a reduction of the verdict, adopted the latter alternative, and the amount of the verdict was reduced to £50.

PROBATE—WILL—ATTESTATION—SIGNATURES OF WITNESSES ON THE MARGIN OF WILL.

In the goods of Streatley (1891), p. 172, Butt, J., following *Roberts* v. *Phillips*, 4 E. & B. 450, held that where witnesses had signed their names in the margin of a will opposite certain alterations, their attestation was sufficient on its being shown that they had so signed with the intention of attesting the testator's

signature, notwithstanding there was a full attestation clause at the end of the will, and the testator had signed his name opposite it, but the attesting witnesses had not signed there.

PROBATE—ADMINISTRATION PENDENTE LITE.

In *Askew* v. *Askew* (1891), p. 174, a grant of administration *pendente lite* was made to the executor named in the will, which was disputed, limited to the amount of two mortgage debts, forming part of the estate of the deceased.

ADMIRALTY—SALVAGE—INEQUITABLE AGREEMENT FOR SALVAGE.

The Rialto (1891), p. 175, was an action to enforce an agreement for salvage. The defendants resisted the action on the ground that the sum agreed to be paid was exorbitant and the agreement inequitable. Butt, J., in giving judgment, observes that the mere fact that the parties to such an agreement are on unequal terms is not of itself sufficient to invalidate such agreements, because in such agreements the contracting parties are nearly always on unequal terms; but if it also appears that the sum contracted for is exorbitant, the Court will not uphold the agreement. In this case, both elements existing, the Court reduced the amount by one-half that agreed to be paid.

Notes on Exchanges and Legal Scrap Book.

INSURANCE APPLICATION.—Knowledge of the assured of a misrepresentation in the application, inserted by the soliciting agent with the assurance that it will make no difference, will not avoid the policy, there being no fraudulent purpose on the part of assured. *Reynolds* v. *Iowa and N. Ins. Co.* (Iowa), 46 N.W. 659

UNAUTHORIZED USE OF A PHOTOGRAPHIC NEGATIVE.—The Supreme Court of Minnesota has recently decided that there is an implied contract between a photographer and his customer that the negative for which the customer sits shall only be used for the printing of such photographic portraits as the customer may order or authorize. The conclusion was that if the photographer undertakes to make another use of the negative, as by multiplying copies for publication or sale, the customer may enjoin such use: *Moore* v. *Rugg*, 9 Law Rep. Ann. 58. See also *Pollard* v. *Photographic Co.*, 40 Ch. Div. 345.—*American Law Review.*

JERSEY LAW.—The island of Jersey, it would appear, has some laws which, fortunately for the world at large, prevail, we imagine, only within its own borders. An action for libel was recently instituted against the proprietor of a

newspaper. In such a case as this, in which a sum is claimed for damages, security for costs may be demanded from the defendant. In this particular case the defendant could not be found, and the plaintiff then called upon the defendant's wife, who was entirely unconnected with the newspaper, to find security, and she, being unable to do so, was taken from her home and children, and, without being brought before a magistrate or heard on her behalf, imprisoned, and this before the trial, and even previous to any evidence being given. But this is not all. Her counsel wrote a temperate letter to the Attorney-General of the island calling his attention to these facts, asking him to take steps to have her brought before the court, and published his letter and the reply thereto, and was forthwith summarily convicted of contempt of court. We are inclined, without prejudice, to think that it would have been wiser for the counsel to have concealed his contempt of such a court.

UNRESTRICTED RECIPROCITY AND CUSTOM HOUSES.—An old and much valued contributor earnestly desires to say something on this subject. His letter is on the borderland of politics, but he gives it a legal "smack," and so we stretch a point and give him a corner in our *Legal Scrap-Book.* He says: "Of course you have read Dr. Goldwin Smith's 'Canada and the Canadian Question,' and admired his splendid English, his idyllic description of La Nouvelle France and its inhabitants, and his lucid clearness in the expression of the opinions he maintains. The Canadian question is a political and not a legal one, and therefore beyond the scope of your journal, except perhaps as regards the legal interpretation the doctor gives of the term 'Unrestricted Reciprocity,' so largely used in stump speeches at the late elections. I am with him that 'commercial union' would remove the custom houses from the boundary line, but cannot agree with him that unrestricted reciprocity 'would legally affect such removal,' for it would only authorize the transport across the line, without payment of duty, of goods produced or manufactured in Canada, or in the United States; and the customs officers would have to be satisfied as to the origin of any goods before allowing them to pass."

GUARANTEE OF A MINOR'S CONTRACT.—We quote from the *London Law Times* a case in which it was held that one cannot guarantee a minor's contract. We think it will be of interest to our readers. The *Times* says:—"A recent decision of the Recorder of London in the Lord Mayor's Court seems to have occasioned considerable consternation among the numerous traders who lay themselves out for doing business with minors, and, indeed, before *Peach* v. *Makins*, the case in question, there appears to be no authoritative judicial determination reported of a legal crux which must have frequently occurred. The plaintiff sold a bicycle to an infant on what is known as the hire system; that is, under a contract that the minor should pay for the machine by certain periodical instalments, and that in default of the payment of any one of these instalments the whole of the

purchase money should become forthwith payable to the vendor. These payments by the minor were guaranteed by a person of full age, who undertook by a clause in the contract to discharge the liabilities of the minor in case the latter made default. The minor having made default, the action was brought by the vendor against the guarantor, as surety for the minor. In answer to the plaintiff's claim the defence was successfully set up that, inasmuch as no debt existed or could legally exist between the plaintiff and the minor, the defendant guaranteed nothing, and reliance was placed on the dicta of Lord Selborne in *Lakeman* v. *Mountstephen* (30 L.T. Rep. N.S. 437; L.R. 7 H. of L. p. 24): 'There can be no suretyship unless there be a principal debtor * * * and until there is a principal debtor there can be no suretyship. Nor can a man guarantee anybody else's debt unless there is a debt of some other person to be guaranteed.'" The Recorder, on the authority of these dicta, accordingly ordered a verdict to be entered for the defendant.

WILL, SIGNATURE OF TESTATOR.—Last month a decision was given by the New York Court of Appeals (*In re Conway's will*) bearing on the position of the testator's signature in a will (R.S.O., 1887, c. 109, s. 12). It appears that part of the proposed will was written on one side of a sheet of paper, and, at the end of such part, were the words, "Carried to the back of the will." The only signature of the testator was at the bottom of this first page. On the back of the sheet appeared the word "continued," followed by sundry testamentary provisions, at the end of which came the words "signature on face of the will." It was held (Bradley, Haight and Brown, JJ., dissenting) that the provision that a will shall be subscribed at the end thereof had not been sufficiently complied with, and that the instrument was void. Parker, J., in delivering the judgment of the Court referred to *Re O'Neil* (91 N.Y. 516), stating that such expressions as "carried to back of will," "continued," and "signature on face of will," were at variance with the words of the statute, that the signature must be at the "end" of the will. He points out the opportunity for fraud offered in such a case, in that any number of disposing paragraphs might be added. He also says, "If by preceding the testimonium clause with the words, 'Carried to back of will' all that is written thereon may be made a part of the will, what is to prevent making another sheet a part of it also, by writing on the bottom of that page, 'continued on sheet one,' and so on, until any number of sheets of paper, with testamentary provisions thereon, be made a part of the instrument, which is signed on the first page? We have thus given some of the reasons which have led us to the conclusions: First, that the O'Neil case" (where the space before the testimonium clause was occupied by a subdivision of the will which is simply completed on the next page) "requires this Court to hold that this will was not signed at the end; second, that the attempted distinction may not be justified on the ground that it cannot be made to so operate as to permit frauds, which it was the design of the Legislature to prevent."

RESPONSIBILITY OF CRIMINALS.—It is commonly believed that a disturbance of the reasoning powers is an inseparable concomitant of insanity; but the evidence of facts has clearly and repeatedly proved that insanity may be moral as well as intellectual, and that, while unsoundness of intellect is invariably accompanied by derangements of the moral sense, an unimpaired intellectual condition is not incompatible with a diseased moral state; in other words, that it is possible for moral madness to exist alone. The statistics of crime show, moreover, that, in the great majority of cases, moral madness is a congenital disease, inherited from parents or ancestors who, if not criminals or inebriates, were mad, or epileptic, or hysterical. Whenever the public conscience is shocked by the discovery of some enormous crime, for which no adequate motive can be assigned, it would be glad to take refuge in this theory of moral madness, to believe that the perpetrator of the crime is a morally irresponsible being. There are several obstacles to the acceptance of this theory, namely, the difficulty of determining the degree to which the criminal is responsible or irresponsible; the desire of society to avenge his victim; and the instinct of self-preservation which prompts it to prevent him from repeating his crime. To escape from the dilemma in which society thus finds itself, it resorts to the legal fiction of pronouncing the criminal a person of sound mind, and punishes him as if he were morally responsible. The argument in favor of this procedure is, that it is the only method by which the society of our day can protect itself from moral lunatics, who are its most dangerous enemies; but the society of the future—it may be of the very distant future—will perhaps adopt a mode of self-defence more rational, more scientific, and more humane. The morally insane are unfortunate rather than culpable. They are in most cases the scapegoats who suffer under a law of hereditary degeneracy for the faults and vices of their ancestors. The duty of an enlightened society, with respect to these unfortunates, is not to punish them after they have been guilty of crimes, but rather to restrain them from becoming criminals, by confining them in anticipation in asylums provided for that special purpose. The duty may be not inappropriately described as one of moral sanitation. When any quarter of a city is badly lighted, ill-ventilated, and not provided with potable water, it is the duty of the whole body of citizens to introduce sanitary arrangements into that quarter, to prevent it from becoming an unhealthy centre, from which disease may spread in all directions. Similarly, when any section of society is in danger of becoming a centre of moral infection, it is the duty as well as the interest of society as a whole to purify that section, or at least to circumscribe it, and so to render it innocuous to its neighbors. In other words, the course to be pursued by society with regard to moral insanity is one of prevention rather than of cure, and one mode of prevention is to hinder the recruitment of the criminal—the morally insane—classes, by giving serious attention to the moral culture of the young.—*Revue Bleue.*

DRUNKENNESS AND ITS ANCIENT PUNISHMENT.—Amid the great variety of treatment to which drunkenness was subjected by the ancients, all lawgivers

seem to agree in treating it as a state of disgrace; and since it is brought on deliberately, it is still more odious and without excuse. Whatever individuals may think and say, no nation treats it as meritorious. Yet Darius is said to have ordered it to be stated in his epitaph that he could drink a great deal of wine and bear it well—a virtue which Demosthenes observed was only the virtue of a sponge. At the Greek festival of Dionysia it was a crime not to be drunk—this being a symptom of ingratitude to the god of wine—and prizes were awarded to those who became drunk most quickly. And the Roman bacchantes, decked with garlands of ivy, and amid deafening drums and cymbals, were equally applauded; but at length even the Bacchanalia were suppressed by a decree of the Senate, about 186 B.C.

Notwithstanding these exceptions, the offence of drunkenness was a source of great perplexity to the ancients, who tried nearly every possible way of dealing with it. If none succeeded, probably it was because they did not begin early enough, by intercepting some of the ways and means by which the insidious vice is incited and propagated.

Severe treatment was often tried to little effect. The Mosaic law seems to have imposed stoning to death, at least if the drunkenness was coupled with any disobedience of parents. The Locrians, under Zaleucus, made it a capital offence to drink wine, if it was not mixed with water; even an invalid was not exempted from punishment unless acting under a physician's order. Pittacus, of Mitylene, made a law that he who, when drunk, committed an offence, should suffer double the punishment which he would do if sober; and Plato, Aristotle, and Plutarch applauded this as the height of wisdom. The Roman censors could expel a senator for being drunk, and take away his horse. Mahomet ordered drunkards to be bastinadoed with eighty blows.

Other nations thought of limiting the quantity to be drunk at one time or at one sitting. The Egyptians put some limit, though what it was is not stated. The Spartans had some limit. The Arabians fixed the quantity at twelve glasses a man; but the size of the glass was not, unfortunately, defined by the historians. The Anglo-Saxons went no further than to order silver nails to be fixed on the side of drinking cups, so that each might know his proper measure; and it is said that this was done by King Edgar, after noticing the drunken habits of the Danes. Lycurgus, of Thrace, went to the root of the matter, by ordering the vines to be cut down; and his conduct was imitated, in 704, by Terbulus, of Bulgaria. The Suevi prohibited the importation of wine, and the Spartans tried to turn the vice into contempt by systematically making their slaves drunk once a year, to show their children how foolish and contemptible men looked in that state.

Drunkenness was deemed much more vicious in some classes of persons than in others. The ancient Indians held it lawful to kill a king when he was drunk. The Athenians made it a capital offence for a magistrate to be drunk, and Charlemagne caused a law to be enacted that judges on the bench and pleaders should do their business fasting. The Carthaginians prohibited magistrates, governors, soldiers, and servants from any drinking.—*Green Bag.*

Correspondence.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—Would you allow me, by means of your journal, to draw the attention of the profession to the reports of the Court of Exchequer that have very lately appeared in print? They are extremely valuable, in that a large proportion of the decisions have reference to the law in regard to expropriation for public purposes, and also in reference to what may be termed the prerogatives of the Crown; subjects that so far have been very little discussed in the reports of this Province.

A perusal of the report of *Paradis* v. *The Queen*, in the 1st Volume, will be very valuable to any lawyer who is engaged in or is advising upon expropriation cases. I know of no case where the law is as clearly stated as in this, and it is particularly valuable in pointing out the wide distinction that exists between the damages that are allowable where lands have been in part expropriated and the remaining lands have suffered damage from such expropriation, and where lands have not been touched but are injuriously affected.

Somewhat strange to say—for few of us expect much from Ottawa except politics—the reporter has done his work well, and the judgments of the present Judge of the Court of Exchequer leave nothing to be desired in clearness and exactness of language, and at the same time the judgments themselves seem to be very accurate expositions of the law as treated in the cases reported. These reports are certainly very valuable, and no member of our profession should be without them. Why is it, too, that the type and paper are so very much superior to the type and paper of our own reports?

Yours, etc.,

M.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—Why is it that the ordinary lawyer gravitates to politics like a duck to water, or the youth to love in the spring of the year? At the present moment probably one-third of the members of our House of Commons are lawyers, and quite likely the same proportion prevails in the different provincial legislatures. It cannot be that it aids them in acquiring a knowledge of their profession, for it is open knowledge to every person that very rarely is a political lawyer an exact lawyer, and in so far as a lawyer devotes himself to politics he simply becomes less and less an exact lawyer. It cannot be for the purpose of securing judgeships, for the article does not go around; and it can hardly be that the aspirants conceive that they will become the rulers of the country, for that article does not go even so far around; and it cannot be to benefit their private pockets, for nearly every lawyer politician becomes poor in the process. Still, the tendency exists, for if our lawyers cannot become members of the Dominion House, they will aim at the Local House, and if they cannot become members of the Local House, they will still aim at becoming members of the council of the village or town in which they reside.

Really, would it not conduce to the peace of mind of the members of our profession if, like persons of other professions, they practically excluded themselves from public life? It is true that every able politician must have some knowledge or ought to have some knowledge of political science and of theoretical law, but it is hardly possible for any lawyer politician, who devotes his life to politics, to have any knowledge practically of what may be termed exact law. It is stated that in the Eastern States, at all events, very few good lawyers at the present time dream for a moment of devoting themselves to public life until, at all events, they are enabled to retire from their profession.

Yours, etc.,

W.H.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—Two cases of the handiwork of "unlicensed conveyancers" have lately been brought to my attention.

One case is where a gentleman who keeps a "real estate and bank office" and is a "J.P., Notary Public, and Commissioner," essays to enunciate the law of landlord and tenant to a "client." "Letter, advice, and postage, 50 cents." I do not wish the name published, as the "legal adviser" is a personal friend of mine, and I would not wish to act unprofessionally to a brother practitioner!

The other case I refer to arose in this way. I had occasion to ask a client of mine as to the title to certain land. He replied: "Oh, it is all right; Mr. —— attended to it at the time of Smith's death." It transpires, however, that Mr. —— has not quite "made it all right," at least not to my satisfaction, though I should of course bow to his superior knowledge. Mr. —— is a Division Court Clerk and ex-butcher, having passed through the stage of auctioneer by way of whetting his mental faculties.

We of the profession are particularly blest in this locality with these irresponsible barnacles. There is a man in this town who does more conveyancing than all the lawyers in the county combined, and almost as much Surrogate Court work. Can nothing be done to relieve the profession of these parasites?

Let us devoutly pray that the new Benchers may be imbued with the spirit of justice towards those of us who have to brush with the world in the battle of life, and that they will not give their undivided attention to the interests of those gentlemen of the profession who are lucky enough to be able to devote themselves to counsel work.

Yours, etc.,

COUNTY OF WELLAND.

DIARY FOR MAY.

1. Fri.....St. Philip and St. James.
2. Sat.....J. A. Boyd 4th Chancellor, 1861.
3. Sun.....*Rogation Sunday.* Mr. Justice Henry died, '88.
5. Tues.....Supreme Court of Canada sits. First Intermediate Examination.
7. Thur....Ascension Day. Second Intermediate Exam.
8. Fri.....York evacuated by U. S. troops, 1813.
10. Sun.....*Sunday after Ascension.* Indian Mutiny, 1857.
12. Tues.....Court of Appeal sits. Gen. Sess. and County Ct. Sitgs. for trial in York. Solicitors' Ex.
13. Wed.....Barristers' Examination.
17. Sun.....*Whitsunday.*
18. Mon.....Easter Term commences. H.C.J., Q.B.D., and C. P. D. Sittings begin. Law School Examination, 3rd year (Honors), begins.
21. Thur....Confederation proclaimed, 1867.
22. Fri.....Earl Dufferin, Governor-General, 1872.
24. Sun.....*Trinity Sunday.* Queen Victoria born, 1819.
25. Mon.....Princess Helena born, 1846.
27. Wed.....Habeas Corpus Act passed, 1679. Battle of Fort George, 1813.
28. Thur.....Law School Exam., 3rd year (Pass), begins.
29. Fri.....Battle of Sackett's Harbor, 1813.
31. Sun .. *1st Sunday after Trinity.*

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

Div'l Court.] [Feb. 2.

DANCEY *v.* GRAND TRUNK RY. CO.

Railways and railway companies—Contract—Passenger ticket—"Via direct line"—Meaning of—Authority of ticket agent.

The defendant company, through an agent at G., sold the plaintiff a passenger ticket from G. to S. and return, on which was printed "via direct line." There were three lines owned by the company by which travellers might go from G. to S. and return, but there was no direct line. The shortest line was by way of L. Crossing and C. The plaintiff, on the return journey, if he had wished to take the shortest line, must have changed at L. Crossing. He did not do so, however, but remained in the train, meaning to reach G. by a longer route, and, on his refusing to leave the train or pay extra fare, he was ejected by the company's servants.

The agent of the defendant company gave the plaintiff and others to understand that tickets such as that sold to the plaintiff entitled the purchaser to travel by any one of the three lines, and the evidence showed that the right of such purchasers to so go and return had, both before and after this occurrence, always been recognized and assented to by the company.

Held, upon the evidence, that the shortest line was not intended by the company to come within the words "direct line" used in the contract, and the contract could not be so construed; that the words "via direct line" were inapplicable to the contract and meaningless, and must be stricken out of it.

2. That the provision "via direct line" was unintelligible to purchasers without some explanation, and that the company, when they entrusted their agent with the sale of tickets, clothed him with the apparent authority to explain the purport and effect of the provision.

Lount, Q.C., and *M. G. Cameron*, for the plaintiff.

Aylesworth, Q.C., for the defendants.

Div'l Court.] [March 6.

MARTHINSON *v.* PATTERSON.

Chattel mortgage—Foreign contract as to chattels in Ontario—R.S.O., c. 125—Chattel mortgages not complying with—Effect of taking possession—Full amount of consideration not advanced—Falsity of affidavits of bona fides—Priorities between mortgages—Subsequent mortgagee in good faith—Notice.

Held, following *River Stave Co.* v. *Sill*, 12 O.R. 557, that goods which were in Ontario at the time of the execution of a document of hypothecation of them were subject to the provisions of R.S.O., c. 125, although the parties thereto were at the time domiciled in a foreign country.

Held, also, that the plaintiff could not, under his prior chattel mortgage, by taking possession of the mortgaged chattels after the execution and filing of a subsequent chattel mortgage to the defendant, although before the time at which the defendant could have taken possession, hold the mortgaged goods against the defendant where the plaintiff's mortgage did not comply with the Act, if the defendant's mortgage had complied therewith.

Judgment of STREET, J., 20 O.R. 125, affirmed on these points.

But where the amount of the consideration for the defendant's mortgage was less than the amount expressed therein and sworn to by the

defendant in his affidavit of *bona fides* as the true amount,

Held, that the defendant's mortgage did not comply with the Act, and the plaintiff by reason of taking possession as before mentioned could hold the goods against the defendant.

Robinson v. *Paterson*, 18 U.C.R. 55, followed.

Hamilton v. *Harrison*, 46 U.C.R. 127, not followed.

Judgment of STREET, J., reversed on this point.

Held, also, that the "subsequent purchasers or mortgagees" referred to in s. 4 of R.S.O., c. 125, are those whose purchases or mortgages are accompanied by an immediate delivery and followed by an actual and continued change of possession or who have complied with the provisions of the Act; and as neither the plaintiff nor the defendant came within the words, the plaintiff being prior in point of time had priority; but if the defendant could be treated as a subsequent mortgagee, he was not a subsequent mortgagee in good faith, by reason of the falsity of his mortgage.

Held, lastly, doubting, but following *Moffatt* v. *Coulson*, 19 U.C.R. 341, that notice of the plaintiff's mortgage when he took his own was not a reason for depriving the defendant of the status of a subsequent mortgagee in good faith.

Shepley, Q.C., for the plaintiff.

Creasor, Q.C., for the defendant.

Div'l. Court.] [March 6.

DELANEY *v.* CANADIAN PACIFIC RAILWAY COMPANY.

Mortgagor and mortgagee—Vacant land—Constructive possession of mortgagee—Statute of Limitations—Presumption of payment—Arrears of interest—R.S.O., c. 111, s. 17—Redemption—Rate of interest post diem.

The plaintiff was mortgagee of certain land under two mortgages, dated respectively 30th June, 1873, and 8th September, 1874. The principal under both mortgages was payable on 30th June, 1875, and the interest under both was at the rate of twelve per cent. per annum. In the sum secured by the latter mortgage was included the interest overdue at its date in respect of the former. The mortgagor was living on the land when he made the mortgages, and continued to live on it till his death in 1874, and after his death his son continued to live on it till some time in 1877, when he abandoned possession and the land became and continued vacant till the defendants took possession in 1888. The plaintiff, however, shortly before the 30th June, 1885, made an actual entry and enclosed the land, and kept possession in that way till the defendants took possession. This action was brought by the plaintiff, claiming, as mortgagee in possession, to recover damages for the defendants' trespass and for an injunction and restitution of the possession. By arrangement a sum of money representing the value of the land was paid into Court, and the question was, how much, if anything, the plaintiff was entitled to under his mortgages.

Held, that as soon as the land became vacant the constructive possession was in the plaintiff, and the Statute of Limitations did not run against him so as to extinguish his title to the land. No presumption of payment of the mortgages arose, for the plaintiff had twenty years to bring his action upon the covenants for payment, and it was proved that the mortgage moneys had never been paid.

Held, also, that this was not an action to recover arrears of interest in respect of money charged upon land within the meaning of R.S.O., c. 111, s. 17; and the amount of arrears of interest which the plaintiff was entitled to recover was to be determined upon the same principles as if a bill had been filed by a mortgagor against a mortgagee in possession to redeem the mortgaged lands; and so the plaintiff was entitled to all arrears of interest upon his mortgages, though after maturity at the rate of six per cent. per annum only.

Arnoldi, Q.C., for the plaintiff.

Ritchie, Q.C., for the defendants.

Div'l Court.] [March 6.

ROBINSON *v.* HARRIS.

Contract—Exchange of lands—Specific performance—Speculative character of properties—Time—Notice to complete—Reasonable notice—Title not in plaintiff—Election to treat contract as binding—Parties—Matter of conveyance.

The plaintiff and defendant entered into a contract for the exchange of lands. The title to the land which the plaintiff contracted to

convey was not in him but in A., who had contracted to sell to B., and B. to the plaintiff. By the contract between the plaintiff and defendant a day was fixed for completion, but time was not made of the essence.

The trial Judge found that the parties were dealing, each to the knowledge of the other, with the properties as a matter of mere speculation. The parties continued to negotiate up to a period some months after the date fixed for completion, when the defendant gave the plaintiff notice that unless the exchange was carried out on the day after the notice, the contract would be treated as rescinded. In an action for specific performance,

Held, that, by reason of the speculative character of the property, the presumption was that time was to be of the essence of the contract; but the presumption was rebutted by the parties treating the contract as still subsisting after the day for completion had passed; and it was then competent for either of them to put an end to the delay by a notice to complete; but the notice given was not a reasonable one and it had no effect upon the rights of the plaintiff.

Held, also, that the defendant had ratified the contract by making requisitions regarding the title with knowledge that it was not in the plaintiff, and could not shift his position and take the ground that no contract ever existed; by treating the contract as a binding one he had made his election and was remitted to the rights of an ordinary purchaser.

Semble, also, that the plaintiff could have made A. a party to an action against B. to compel specific performance of B.'s contract, offering to carry out, on B.'s behalf, the whole contract between A. and B., and therefore the objection to the plaintiff's title was a mere matter of conveyance.

F. E. Hodgins for the plaintiff.

J. B. Clarke, Q.C., for the defendant.

Chancery Division.

Div'l Court.] [Feb. 20.

ZILLIAX *v.* DEANS ET AL.

Voluntary Settlement—Conveyance of land to wife—Attaching creditor—Claim under $40.

A creditor for an amount under $40 is not such a creditor as can attack and set aside a conveyance of land as voluntary, or fraudulent, and he cannot improve his position by bringing his action on behalf of other creditors.

Shepley, Q.C., for appeal.

Idington, Q.C., contra.

MANITOBA.

COURT OF QUEEN'S BENCH.

KILLAM, J.] [February 24.

IN RE SHAW.

Certiorari—Gaming house—By-law and provincial statute—Ultra vires.

Applicant was convicted of having unlawfully kept a gambling-house in Winnipeg contrary to the provisions of a civic by-law which is claimed to have been authorized by a provincial statute empowering the City Council to pass by-laws suppressing gambling-houses. Sec. 37 Vict., c. 7, s. 96-8, 1873; 45 Vict., c. 36, s. 101, 1882; 53 Vict., c. 51, 1890.

Held, that the provincial statute and the by-law were invalid, being *ultra vires*, on the ground that under B.N.A. Act, s. 91, s-s. 27, a gambling-house comes within the subject of "criminal law," and hence within the powers of parliament, and that such an offence must be punished by indictment or such other procedure as parliament may provide.

2. That, at common law, gambling was not in itself unlawful, though it was so to keep a common gaming-house.

3. That 38 Vict., c. 41 (C.), does not prevent the proof of the offence of keeping a common gaming-house by such evidence as would have been sufficient at common law and before any games were made unlawful.

Certiorari granted.

Hough for City of Winnipeg.

C. P. Wilson for prisoner.

BAIN, J.] [Feb. 26.

GILLESPIE *v.* LLOYD ET AL.

Demurrer—Wrong parties—Shareholaers' right in a corporate company.

Bill filed by a shareholder on behalf of himself and of all other the shareholders of the H. B. Ry. Co. against the holders of certain bonds which, he claims, were issued by the president without authority, and asking that they be de

clared not to be a charge on the property or land grant, and praying delivery up of same. His bill alleges that shortly after the company was incorporated and before the year 1886, the plaintiff became a shareholder thereof by being the owner of a portion of the capital stock thereof, and has ever since remained on the books of the company a shareholder thereof, and is recognized by the railway company as a shareholder. The bill also alleges that the plaintiff has repeatedly called upon and urged the directors and officers of the company to take legal proceedings to prevent the sale or other disposition of the bonds and to have same declared to be improperly issued, but that they neglected and refused.

Demurrer on two grounds :—1. That the allegation above given of the plaintiff's title is not a sufficient one, and that what is stated is merely a conclusion of law; and (2), that even if the plaintiff is a shareholder the bill does not disclose such a state of circumstances as enables him to sue in his individual capacity.

The term "shareholder" is indefinite; although apparently the allegation of title was not sufficient, yet it was not necessary to a decision and so not decided: *Willburn* v. *Negleby*, 1 M. & K. 51; *Hamilton* v. *Desjardins Canal Co.*, 1 Gr. 1; *Banks* v. *Porter*, 16 Si. 176.

Held, 1. that actions by one member of a class on behalf of himself and all others of that class are permissible when the object of the suit is to obtain relief to which the whole class is entitled, and when the members of the class are so numerous that they cannot all be made parties by name (that is, an action might be permissible on the ground of necessity or convenience); but when a company is incorporated and its officers and directors have done or are doing something that is illegal and which affects the whole company, then under ordinary circumstances it is the company that ought to sue in its corporate name.

2. That there might be an exception to the general rule arising from the necessities of the case, and in order that there might not be a failure of justice and in order to prevent oppressive litigation it should not be allowed to prevail in cases where there is no necessity for it, as in this case.

Demurrer allowed with costs.

Howell, Q.C., and *Tupper*, Q.C., for plaintiff.

Ewart, Q.C., and *Bradshaw*, for defendants.

KILLAM, J.] [March 4.

RITCHIE *v.* GRUNDY.

Mechanics' Lien Act—Agreement waiving lien.

This was a bill filed to enforce a Mechanics' Lien under the Act, for building an addition to the defendant's residence under a written contract, and for certain extras. The defendant denies completion, and disputes the principal portion of the claim for extras. The contract provided that the payment of $500 by the defendant, $100 in cash, $200 during the process of the work, and $200 by note six months after the completion of the work. The only evidence offered showed completion and an agreement as to certain extras, for which the plaintiff demanded the six months note for the balance due under the contract and was refused.

Held (1), that where, by the agreement of the parties, the price of the work is not payable until the time for enforcing the lien is past, no lien exists.

2. That it is a well-known principle with liens recognized at common law, that a lien does not exist where the contract between the parties or the circumstances are inconsistent with the notion that one was intended.

3. In view of the well-known principle that an action will not lie for a debt until the time for payment has expired, an agreement that there shall be no lien should be implied under a contract merely for payment at a date later than that at which the bill could be filed to enforce the lien.

4. That if the contract is for the giving, within the time for enforcing the lien, a promissory note or other security for the price, the agreement to waive the lien should be considered conditional upon the giving of the note or security.

"In view of certain variations in the contract, the plaintiff was to be entitled to a lien upon the lands described, if upon completion the defendant wrongfully refused to give the note and upon other terms and conditions suited to the peculiar nature of the case."

Amendment allowed upon terms.

Mulock, Q.C., for plaintiff.

Aikins, Q.C., and *Patterson*, for the defendants.

Full Court.] [March 7.

FONSECA *v.* SCHULTZ.

Lien—Tax sale—Redemption of portion of land.

Bill to establish lien on certain lots. The plaintiff and defendant owned three parcels of land which were sold for taxes, each lot being sold separately. The plaintiff, in seeking to redeem those parts of said parcels which she owned, was forced by the city treasurer to pay the whole amount of the arrears of taxes, interest thereon, and charges, for which the three parcels were sold. She then filed a bill to have a lien declared in her favor on the interest of the defendant in the said parcels.

The defendant demurred. Judgment by Bain, J., overruling demurrer. Defendant appealed.

Sec. 667 of Municipal Act, 1886, provides for redemption by "the owner . . . or his executors, etc., . . . or any other person on their or his behalf, but in his name only," of "the estate sold, by paying or tendering . . . for the use and benefit of the purchaser . . . the sum paid by him, etc." It contains no provision for the redemption of part of the land sold, and makes no mention of such redemption except in the concluding clause.

Held, that it was necessary for the plaintiff to pay the taxes upon the whole land in order to secure her own portion. Section 638 refers to payment of taxes before sale and does not apply to this case, distinguishing same from Con. Stat. U.C., c. 55, s. 113, and *Payne* v. *Goodyear*, 26 U.C.R. 448, decided thereon.

Appeal dismissed with costs.

Tupper, Q.C., and *Phippen*, for defendant.

Andrews and *Harvey* for plaintiff.

Full Court.] [March 7.

RE MATHERS.

Real Property Act—Taxation of half-breed land—Allotment.

Case stated by district registrar to Judge in Chambers under s. 120, R.P. Act, and by said judge referred to Full Court. Certain lands were allotted some time prior to 1883 to one Ross, as the child of a half-breed head of a family, but the Crown patent therefor was not issued till January 28th, 1886. Ross attained eighteen years on February 4th, 1883. The land was sold on November 21st, 1887, for arrears of taxes for years 1882-4-5. The following question was submitted: "Was such sale for arrears of taxes for 1884-5, for which years the land was assessed to the allottee Ross, legal when the legal title remained in the Crown until January 28th, 1886?"

By s. 125, B.N.A. Act, "no lands belonging to Canada or any province shall be liable to taxation."

By s. 30, Manitoba Act, all ungranted lands in the Province shall be vested in the Crown, and administered by the Government of Canada for the purposes of the Dominion.

Held (1), that after the allotment of the land in question to the half-breed Ross, he was precisely in the same position as he would have been had he agreed to purchase this land from the Crown, and had become entitled to the patent; while the legal estate remained vested in the Crown, the beneficial interest belonged to and was vested in Ross, and it was competent for the Provincial Legislature to make such interest liable to taxation if it saw fit to do so. *Railway Co.* v. *Prescott*, 83 U.S. Sup. Ct. 603, approved of.

By Municipal Act, 1883, s. 239 and s. 4, s-s. 5, real property, and "all rights thereto and interests therein," were made liable to taxation.

Held, the interest or property of Ross was "real estate" or "real property," which both Acts (1883-84) made liable to taxation, except such of it as was specially exempted, and the fact that this land is not specially referred to in these sections as one of the kinds of unpatented lands that may be taxed should not be held to override the intention expressed in other provisions of the Acts, that it was liable to be taxed.

Question answered in the affirmative.

C. P. Wilson for the district registrar.

Mathers for applicant.

Notes of United States Cases.

ALABAMA SUPREME COURT.

LOUISVILLE & N.R. CO. *v.* WEBB.

Railroads—Accidents at crossings—Contributory negligence.

Held, that a person familiar with a railway crossing is guilty of contributory negligence in attempting to cross without looking to the right or the left, and the facts that the engine by which he was struck was moving at an unlawful rate of speed, and that the company's watchman, at whom plaintiff was looking, failed to warn him, do not so neutralize the effect of plaintiff's contributory negligence as to make it a question for the jury.

NEW YORK SUPREME COURT.

FIRST NATIONAL BANK OF CARTHAGE *v.* YOST.

Payment of forged check—Bank's right of recovery—Endorsement for collection.

1. The rule that the drawee of a check or bill is presumed to know the signature of the drawer, and if he accepts or pays a bill in the hands of a *bonâ-fide* holder to which the drawer's name has been forged, he is bound by the act and can neither repudiate the acceptance nor recover the money paid—applied.

2. An indorsement by the holder for collection does not guarantee the signature of the drawer, or take the case out of the application of the above rule.

TEXAS COURT OF APPEALS.

FIRST NATIONAL BANK OF TEXARKANA *v.* WEVER.

Presentment of note—Proper place of protest—Damages.

At the maturity of a note the bank at which it was payable had ceased to do business, and its banking-house was closed and unoccupied. The maker did not reside in the city. The defendant was then the only bank there, and it caused the note to be presented for payment at its own counter, and had it protested.

Held, that the demand for payment was made at the proper place, and that the defendant was not liable in damages for an illegal protest of the note.

Appointments to Office.

MASTER OF THE ROLLS.

Prince Edward Island.

Edward Jarvis Hodgson, of the city of Charlottetown, in the Province of Prince Edward Island, Esquire, one of Her Majesty's Counsel learned in the Law, to be Master of the Rolls in Chancery and an Assistant Judge of the Supreme Court of Prince Edward Island, *vice* the Honorable Mr. Justice Peters, resigned.

COUNTY COURT JUDGE.

County of Grey.

John Creasor, of the town of Owen Sound, in the Province of Ontario, Esquire, one of Her Majesty's Counsel learned in the Law, to be Judge of the County Court of the county of Grey, in the said Province of Ontario.

His Honor John Creasor, Judge of the County Court of the county of Grey, to be a Local Judge of the High Court of Justice for Ontario.

SHERIFFS.

County of Brant.

William Watt the younger, of the city of Brantford, in the county of Brant, Esquire, to be Sheriff in and for the said county of Brant, in the room and stead of William John Scarfe, Esquire, deceased.

County of Oxford.

James Brady, of the town of Ingersoll, in the county of Oxford, Esquire, to be Sheriff in and for the said county of Oxford, in the room and stead of George Perry, Esquire, deceased.

REGISTRARS OF DEEDS.

County of Lambton.

Archibald MacLean, of the town of Sarnia, in the county of Lambton, Esquire, to be Registrar of Deeds in and for the said county of Lambton, in the room and stead of Edward Moore Proctor, Esquire, deceased.

County of Wentworth.

Lewis Springer, of the city of Hamilton, in the county of Wentworth, Esquire, to be Registrar of Deeds in and for the said county of Wentworth, in the room and stead of James Miller Williams, Esquire, deceased.

County of Frontenac.

James Duncan Thompson, of the city of Kingston, in the county of Frontenac, Esquire, to be Registrar of Deeds in and for the said county of Frontenac, in the room and stead of Roderick Macbain Rose, Esquire, deceased.

POLICE MAGISTRATE.

Town of Barrie.

Charles Hammond Ross, of the town of Barrie, in the county of Simcoe, Esquire, to be Police Magistrate in and for the said town of Barrie without salary.

DIVISION COURT CLERKS.

District of Algoma.

William J. Smith, of the village of Richard's Landing, St. Joseph's Island, in the District of Algoma, Gentleman, to be Clerk of the Sixth Division Court of the said District of Algoma, in the room and stead of Alexander T. Rose, removed from the district.

County of Hastings.

Francis Bell Prior, of the village of Wallbridge, in the county of Hastings, Gentleman, to be Clerk of the Second Division Court of the said county of Hastings, in the room and stead of D. R. Ketcheson, resigned.

Counties of Leeds and Grenville.

Isaac C. Alguire, of the village of Athens, in the county of Leeds, one of the united counties of Leeds and Grenville, Gentleman, to be Clerk of the Ninth Division Court of the said united counties of Leeds and Grenville, in the room and stead of Reid B. Alguire, deceased.

County of Wellington.

George Howard, of the city of Guelph, in the county of Wellington, Gentleman, to be Clerk of the First Division Court of the said county of Wellington, in the room and stead of Alfred A. Baker, deceased.

DIVISION COURT BAILIFFS.

County of Hastings.

Lewis Cruickshank, of the town of Trenton, in the county of Hastings, to be a Bailiff of the Ninth Division Court of the said county of Hastings.

County of Oxford.

Warren Henry Cody, of the village of Sweaburg, in the county of Oxford, to be Bailiff of the Fifth Division Court of the said county of Oxford, in the room and stead of James Brady, resigned.

District of Parry Sound.

Perpetus Bodeau, of the village of Byng Inlet, in the District of Parry Sound, to be a Bailiff of the First Division Court of the said District of Parry Sound, in the room and stead of James Coff, resigned.

County of Perth.

William Dent Weir, of the village of Milverton, in the county of Perth, to be Bailiff of the Fifth Division Court of the said county of Perth, in the room and stead of Alexander Munro, resigned.

COMMISSIONER FOR TAKING AFFIDAVITS.

City of Liverpool (England).

Frank John Leslie, solicitor, of 15 Union Court, Castle street, in the city of Liverpool, in that part of the United Kingdom of Great Britain and Ireland called England, to be a Commissioner for administering oaths in the Supreme Court and in the Exchequer Court of Canada.

Law Students' Department.

The dates of the Law School Examinations for Easter term are as follows :—3rd Year Pass, 18th to 20th of May. Results to be announced on the 27th. 3rd Year Honors—28th to 30th of May. Results to be announced on the 4th of June. 1st Year Pass—4th of June. 2nd Year Pass—5th and 6th of June. Results to be announced on the 16th. 1st Year Honors—17th of June. 2nd Year Honors—18th and 19th of June. Results to be announced on the 26th.

Examinations outside the Law School :—1st Intermediate—5th May. 2nd Intermediate—7th May. Solicitor—12th May. Barrister—13th May.

EXAMINATION PAPERS.

FROM EXAMINATION FOR CALL (ENGLAND), EASTER, 1891.

Real and Personal Property.

State and explain the mode of settlement of leasehold property or personal chattels so as to devolve with settled freehold land, and show how far such settlements can be effectually carried out.

Interpret and comment on the following expressions: "Innocent conveyance," "contingency with double aspect," "special occupant," "springing use," "shifting use."

In what different ways can a joint tenancy of real estate be severed?

Define a "perpetuity," and state the rules governing the limitations of estates in land in reference to the law of perpetuities.

Equity.

Distinguish cases of ademption from cases of satisfaction. Give instances of the doctrine of election arising in such cases.

State the doctrine of presumption against double portions, and its application to cases of ademption or satisfaction. How far is parol evidence admissible as to intention or otherwise as to such presumption?

What are the presumptions as to satisfaction in cases of a legacy to the creditor of a testator, or advancements by a parent to a child to whom he is a debtor?

State and illustrate the present law as to injunctions against cutting timber in cases between (*a*) mortgagee and mortgagor; (*b*) tenant for life and remainderman. Also as to injunctions in respect of permissive waste.

In what circumstances can a defendant resist an action for specific performance on the ground of the contract being entered into by him under circumstances of mistake or surprise? When is alleged mistake no defence?

Common Law.

What is meant by the phrase "privity of contract"? Explain what is meant when it is said that an action will not lie for "want of privity."

When is an "acceptance and actual receipt" of goods sufficient to satisfy section 17 of the Statute of Frauds? Discuss the case of *Morton* v. *Tibbitt*, *15 Q.B. 428.*

What is the measure of damages—(1) in an action for not delivering goods; (2) in an action for not accepting goods; (3) in an action for the wrongful conversion of goods by the defendant?

Illustrate by examples the distinction between a public nuisance and a private nuisance. What proceedings can be taken to remedy (1) a public nuisance; (2) a private nuisance?

What is meant by an "easement"? How can an easement be acquired? Can an easement be abandoned?

What is the meaning of the word "intention" in connection with criminal law? Illustrate your answer by examples.

Flotsam and Jetsam.

SEVEN of the supposed-to-be sharpest and wisest lawyers in the country have made wills, passed away, and the said wills have been broken all to flinders by heirs and other lawyers. An ignorant Missouri farmer wrote his will in four lines on a slate, and it stood three law suits and ten lawyers.—*Chicago Mail.*

SIR GEORGE ROSE had a friend who had been appointed to a judgeship in one of the colonies, and who, long afterwards, was describing the agonies he endured in the sea passage when he first went out. Sir George listened with great commiseration to the recital of these woes, and said, "It's a great mercy you did not throw up your appointment."—*Curiosities of the Law and Lawyers.*

A MILLER had his neighbor arrested upon the charge of stealing wheat from his mill, but being unable to substantiate the charge by proof, the court adjudged that the miller should make an apology to the accused. "Well," says he, "I have had you arrested for stealing m y I can't prove it, and am sorry for it."—*Ibid.*

THE lower branch of the Ohio Legislature has passed a law which gives an undertaker the right, if a coffin is not paid for within three

years, to dig it up, eject the tenant and reclaim the property—a sort of mechanic's lien on the houses of the dead. Also the stonecutter may remove the monument which records the virtues of the dead—wipe out, as it were the mortuary honors, and in its place chisel other records. There is, in the passage of such a bill, an unconscious measure of the character and ability of those who vote for its passage.—*Legal Advertiser.*

MAGISTRATE (to prosecutor)—"And where did you say you caught the prisoner with your pig?"

Prosecutor—"At the bridge, about two miles from my house. He was carrying it."

Magistrate (to prisoner)—"Well, what have you to say?"

Prisoner—"Oh, your Honor, it was only a joke."

Magistrate—"I'll give you six months—because you carried that joke to far."—*Fliegende Blaetter.*

AT a recent election at Atchison, Kansas, U.S., Mrs. Mary T. Burton, formerly editor of the *Kansan* and at present postmistress, was elected police judge at Jamestown. Mrs. Jessie McCormick was elected police judge at Burr Oak. Both are strong prohibitionists. Mrs. Burton is the widow of a prominent politician who died from the effects of strong drink.

LAW SOCIETY.

EASTER TERM, 1891: MEETINGS OF CONVOCATION.

Monday, May 18th, at 10 a.m.
Tuesday, May 19th, at 10 a.m.
Saturday, May 23rd, at 11 a.m.
Friday, May 29th, at 11 a.m.
Saturday, June 6th, at 11 a.m.
Half-Yearly Meeting, Tuesday, June 30th, at 11 a.m.

LAW STUDENT WANTED

Immediately; salary; second or third year; fair knowledge of searching titles. Address "H," care of Editor CANADA LAW JOURNAL.

Law Society of Upper Canada.

THE LAW SCHOOL, 1891.

LEGAL EDUCATION COMMITTEE.

CHARLES MOSS, Q.C., *Chairman.*

C. ROBINSON, Q.C. Z. A. LASH, Q.C.
JOHN HOSKIN, Q.C. J. H. FERGUSON, Q.C
F. MACKELCAN, Q.C. N. KINGSMILL, Q.C.
W. R. MEREDITH, Q.C.

This notice is designed to afford necessary information to Students-at-Law and Articled Clerks, and those intending to become such, in regard to their course of study and examinations. They are, however, also recommended to read carefully in connection herewith the Rules of the Law Society which came into force June 25th, 1889, and September 21st, 1889, respectively, copies of which may be obtained from the Secretary of the Society, or from the Principal of the Law School.

Those Students-at-Law and Articled Clerks, who, under the Rules, are required to attend the Law School during all the three terms of the School Course, will pass all their examinations in the School, and are governed by the School Curriculum only. Those who are entirely exempt from attendance in the School will pass all their examinations under the existing Curriculum of The Law Society Examinations as heretofore. Those who are required to attend the School during one term or two terms only will pass the School Examination for such term or terms, and their other Examination or Examinations at the usual Law Society Examinations under the existing Curriculum.

Provision will be made for Law Society Examinations under the existing Curriculum as formerly for those students and clerks who are wholly or partially exempt from attendance in the Law School.

Each Curriculum is therefore published herein accompanied by those directions which appear to be most necessary for the guidance of the student.

CURRICULUM OF THE LAW SCHOOL, OSGOODE HALL, TORONTO.

Principal, W. A. REEVE, Q.C.

Lecturers: E. D. ARMOUR, Q.C.
A. H. MARSH, B.A., LL.B., Q.C.
R. E. KINGSFORD, M.A., LL.B.
P. H. DRAYTON.

The School is established by the Law Society of Upper Canada, under the provisions of rules passed by the Society with the assent of the Visitors.

Its purpose is to promote legal education by affording instruction in law and legal subjects to all Students entering the Law Society.

The course in the School is a three years course. The term commences on the fourth Monday in September and closes on the first Monday in May; with a vacation commencing on the Saturday before Christmas and ending on the Saturday after New Year's Day.

Students before entering the School must have been admitted upon the books of the Law Society as Students-at-Law or Articled Clerks. The steps required to procure such admission are provided for by the rules of the Society, numbers 126 to 141 inclusive.

The School term, if duly attended by a Student-at-Law or Articled Clerk is allowed as part of the term of attendance in a Barrister's chambers or service under articles.

The Law School examinations at the close of the School term, which include the work of the first and second years of the School course respectively, constitute the First and Second Intermediate Examinations respectively, which by the rules of the Law Society, each student and articled clerk is required to pass during his course; and the School examination which includes the work of the third year of the School course, constitutes the examination for Call to the Bar, and admission as a Solicitor.

Honors, Scholarships, and Medals are awarded in connection with these examinations. Three Scholarships, one of $100, one of $60, and one of $40, are offered for competition in connection with each of the first and second year's examinations, and one gold medal, one silver medal, and one bronze medal in connection with the third year's examination, as provided by rules 196 to 205, both inclusive.

The following Students-at-Law and Articled Clerks are exempt from attendance at the School.

1. All Students-at-Law and Articled Clerks attending in a Barrister's chambers or serving under articles elsewhere than in Toronto, and who were admitted prior to Hilary Term, 1889.

2. All graduates who on the 25th day of June, 1889, had entered upon the *second* year of their course as Students-at-Law or Articled Clerks.

3. All non-graduates who at that date had entered upon the *fourth* year of their course as Students-at-Law or Articled Clerks.

In regard to all other Students-at-Law and Articled Clerks, attendance at the School for one or more terms is compulsory as provided by the Rules numbers 155 to 166 inclusive.

Any Student-at-Law or Articled Clerk may attend any term in the School upon payment of the prescribed fees.

Students and clerks who are exempt, either in whole or in part, from attendance at The Law School, may elect to attend the School, and to pass the School examinations, in lieu of those under the existing Law Society Curriculum. Such election shall be in writing, and, after making it, the Student or Clerk will be bound to attend the lectures, and pass the School examination as if originally required by the rules to do so.

A Student or Clerk who is required to attend the School during one term only, will attend during that term which ends in the last year of his period of attendance in a Barrister's Chambers or Service under Articles, and will be entitled to present himself for his final examination at the close of such term in May, although his period of attendance in Chambers or Service under Articles may not have expired. In like manner those who are required to attend during two terms, or three terms, will attend during those terms which end in the last two, or the last three years respectively of their period of attendance, or Service, as the case may be.

Every Student-at-Law and Articled Clerk before being allowed to attend the School, must present to the Principal a certificate of the Secretary of the Law Society shewing that he has been duly admitted upon the books of the Society, and that he has paid the prescribed fee for the term.

The Course during each term embraces lectures, recitations, discussions, and other oral

methods of instruction, and the holding of moot courts under the supervision of the Principal and Lecturers.

During his attendance in the School, the Student is recommended and encouraged to devote the time not occupied in attendance upon lectures, recitations, discussions or moot courts, in the reading and study of the books and subjects prescribed for or dealt with in the course upon which he is in attendance. As far as practicable, Students will be provided with room and the use of books for this purpose.

The subjects and text-books for lectures and examinations are those set forth in the following Curriculum :

FIRST YEAR.

Contracts.

Smith on Contracts.
Anson on Contracts.

Real Property.

Williams on Real Property, Leith's edition.

Common Law.

Broom's Common Law.
Kerr's Student's Blackstone, books 1 and 3.

Equity.

Snell's Principles of Equity.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

SECOND YEAR.

Criminal Law.

Kerr's Student's Blackstone, Book 4.
Harris's Principles of Criminal Law.

Real Property.

Kerr's Student's Blackstone, Book 2.
Leith & Smith's Blackstone.
Deane's Principles of Conveyancing.

Personal Property.

Williams on Personal Property.

Contracts and Torts.

Leake on Contracts.
Bigelow on Torts—English Edition.

Equity.

H. A. Smith's Principles of Equity.

Evidence.

Powell on Evidence.

Canadian Constitutional History and Law.

Bourinot's Manual of the Constitutional History of Canada. O'Sullivan's Government in Canada.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to the above subjects as shall be prescribed by the Principal.

THIRD YEAR.

Contracts.

Leake on Contracts.

Real Property.

Dart on Vendors and Purchasers.
Hawkins on Wills.
Armour on Titles.

Criminal Law.

Harris's Principles of Criminal Law.
Criminal Statutes of Canada.

Equity.

Lewin on Trusts.

Torts.

Pollock on Torts.
Smith on Negligence, 2nd edition

Evidence.

Best on Evidence.

Commercial Law.

Benjamin on Sales.
Smith's Mercantile Law.
Chalmers on Bills.

Private International Law.

Westlake's Private International Law.

Construction and Operation of Statutes.

Hardcastle's Construction and Effect of Statutory Law.

Canadian Constitutional Law.

British North America Act and cases thereunder.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

During the School term of 1890-91, the hours of lectures will be 9 a.m., 3.30 p.m., and 4.30 p.m., each lecture occupying one hour, and two lectures being delivered at each of the above hours.

Friday of each week will be devoted exclusively to Moot Courts. Two of these Courts will be held every Friday at 3.30 p.m., one for the Second year Students, and the other for the Third year Students. The First year Students will be required to attend, and may be allowed to take part in one or other of these Moot Courts.

Printed programmes showing the dates and hours of all the lectures throughout the term, will be furnished to the Students at the commencement of the term.

GENERAL PROVISIONS.

The term lecture where used alone is intended to include discussions, recitations by, and oral examinations of, students from day to day, which exercises are designed to be prominent features of the mode of instruction.

The statutes prescribed will be included in and dealt with by the lectures on those subjects which they affect respectively.

The Moot Courts will be presided over by the Principal or the Lecturer whose series of lectures is in progress at the time in the year for which the Moot Court is held. The case to be argued will be stated by the Principal or Lecturer who is to preside, and shall be upon the subject of his lectures then in progress, and two students on each side of the case will be appointed by him to argue it, of which notice will be given at least one week before the argument. The decision of the Chairman will be pronounced at the next Moot Court, if not given at the close of the argument.

At each lecture and Moot Court the roll will be called and the attendance of students noted, of which a record will be faithfully kept.

At the close of each term the Principal will certify to the Legal Education Committee the names of those students who appear by the record to have duly attended the lectures of that term. No student will be certified as having duly attended the lectures unless he has attended at least five-sixths of the aggregate number of lectures, and at least four-fifths of the number of lectures of each series during the term, and pertaining to his year. If any student who has failed to attend the required number of lectures satisfies the Principal that such failure has been due to illness or other good cause, the Principal will make a special report upon the matter to the Legal Education Committee. For the purpose of this provision the word "lectures" shall be taken to include Moot Courts.

Examinations will be held immediately after the close of the term upon the subjects and text books embraced in the Curriculum for that term.

The percentage of marks which must be obtained in order to pass any of such examinations is 55 per cent. of the aggregate number of marks obtainable, and 29 per cent. of the marks obtainable on each paper.

Examinations will also take place in the week commencing with the first Monday in September for students who were not entitled to present themselves for the earlier examination, or who having presented themselves thereat, failed in whole or in part.

Students whose attendance at lectures has been allowed as sufficient, and who have failed at the May examinations, may present themselves at the September examinations at their own option, either in all the subjects, or in those subjects only in which they failed to obtain 55 per cent. of the marks obtainable in such subjects. Students desiring to present themselves at the September examinations must give notice in writing to the Secretary of the Law Society, at least two weeks prior to the time fixed for such examinations, of their intention to present themselves, stating whether they intend to present themselves in all the subjects, or in those only in which they failed to obtain 55 per cent. of the marks obtainable, mentioning the names of such subjects.

Students are required to complete the course and pass the examination in the first term in which they are required to attend before being permitted to enter upon the course of the next term.

Upon passing all the examinations required of him in the School, a Student-at-Law or Articled Clerk having observed the requirements of the Society's Rules in other respects, becomes entitled to be called to the Bar or admitted to practise as a Solicitor without any further examination.

The fee for attendance for each Term of the Course is the sum of $10, payable in advance to the Secretary.

Further information can be obtained either personally or by mail from the Principal, whose office is at Osgoode Hall, Toronto, Ontario.

The Canada Law Journal.

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A CORRESPONDENT, in dealing with the question discussed recently in these pages, as to the abolition of Grand Juries, makes some valuable suggestions on the subject. We shall look with interest to see if any action is taken this session by the Dominion Government. We notice that several of the judges advocate the retention of the venerable institution. There have always been those who have opposed reforms which have eventually proved their usefulness.

WE fancy none but an Irish lawyer would ever have conceived the idea of bringing an action such as *Walker* v. *Great Northern Railway Co.*, 28 L.R. Ir. 69. It has such a delightful air of audacity that no one of any other nationality would imagine, much less put into action, so extraordinary a claim as was there preferred. The plaintiff was an infant, and, while *en ventre sa mère*, her mother was a passenger on the defendants' railway. Owing to some negligence on the part of the defendants' servants an accident occurred and the mother was injured, for which she made a claim against the company, which was settled. Subsequently the plaintiff was born, and the action we refer to was brought by her, claiming £1000 damages for permanent injury received by her in the accident before she was born. It is almost needless to say the action failed. Mr. Justice O'Brien was of opinion that "In law, in reason, in the common language of mankind, in the dispensations of Nature, in the bond of physical union, and the instinct of duty and solicitude, on which the continuance of the world depends, *a woman is the common carrier of her unborn child, and not a railway company.*"

IT is rumored that the Law Society, from motives of economy, are going to dispense with the flower beds in Osgoode Hall grounds during the coming summer. We hope the rumor will prove to be unfounded. The beauty of the grounds during the past few years has been very much enhanced by the flower beds, the freedom of which from any danger of theft or spoliation has been amply demonstrated. Of course a few flowers in the grounds may be made a somewhat expensive luxury. A special gardener may be appointed at a high salary to look after them, etc.; but while such extravagance is not to be desired, it is no reason why the Society should forego its garden. The comparatively few flowers which have heretofore been planted ought to be got for about $20 or $30. The planting and taking care of them should not cost more than another $20 or $30 at the outside, and if the Society is reduced to such an extremity that it

cannot afford to spend that much on beautifying the grounds, it is to be pitied. If this kind of economy goes on, we may next expect to hear that the lawns at Osgoode Hall have been let out as a pasture field; that would save the expense of mowing the grass, and, besides, might bring a few dollars into the treasury for the agistment of cattle.

IT might have been expected, amid the multitude of legislatures over the border, that some peculiar, not to say interesting, enactments should have been produced. Among the acts before the New York Legislature, we find one directing the confinement of any person acquitted of murder on the ground of insanity in an insane asylum for a fixed term of years, there to remain until pronounced cured *and pardoned by the governor.* We fail to understand why one who has been acquitted should require a pardon. We are reminded by this of the case of one Borras, at Narbonne, France, who some time ago was condemned to death for murder and subsequently pardoned and set at liberty as innocent, who has just been ordered by the Court to pay 3000 francs as damages to the son of the murdered man. It seems a peculiar judgment to pronounce against an innocent man, but serves to show that France and New York State have ideas in common. Minnesota next comes forward with a bill making it a misdemeanor for a newspaper proprietor to publish any article without the writer's signature. The St. Paul *Pioneer Press* points out that under this law every market report, death notice and joke must state its compiler, author or perpetrator respectively. In Wisconsin and Illinois, foreign immigration seems to be paving the way for the abandonment of the provision that children in the public schools shall be educated in the English tongue. The *Albany Law Journal,* in commenting on this subject, says: "The integrity of this country depends in a great degree on a common language. There is nothing more disturbing in Canada than the co-existence of the French with the English tongue. Foreigners ought to understand that although America is an asylum for all nations, yet they may not graft their languages, customs and political notions on us. They may come, but they should conform in matters of essential importance. There should be one tongue for legislative and judicial proceedings, enactments and decisions, and for all public promulgations, and that should be the English." Our neighbors, in addition to the negro problem and the race element in politics, are beginning their struggle with the dual language question, now so prominent in the politics of our own Dominion.

THE snarl into which the practice relating to actions against partners has drifted in consequence of recent English decisions has suggested the idea that the rules of practice on this subject need a very careful revision, which, it is to be hoped, they may soon get at the hands of the English judges. The principle which the rules were designed to carry out was a good one, but as is often the case when some new method of procedure is introduced, unexpected difficulties arise in working it out which failed to present themselves to the mind of the

draughtsman. No one can be expected to provide for every contingency, or to see with prophetic forecast all the results which may flow from a given state of things, and it is, after all, only actual experience which can be expected fully to test a system or disclose its defects. The scheme of the rules, as they stand, enables a suitor to sue a firm by its firm name, in many cases an obvious convenience. But in the event of the action being successful it may be necessary to levy execution, not only against the firm, but also against the separate individuals of which the firm is composed, and it is in the endeavor to provide machinery to reach that desirable result that the present rules appear to have broken down. The names of the individual partners need not be stated in the writ, but any partner who is actually served with the writ is liable, should the plaintiff recover judgment against the firm, to have execution issued against him. And this is where the difficulty arises. The firm may be served, either by serving the writ on one or more of the partners, or upon any person having the control or management of the partnership business, at its principal place of business.

There appears to be nothing which requires a plaintiff to state in what capacity he effects service on an individual, whether as partner or manager, and the consequence is, a person so served is left in somewhat of a quandary. If he has been served as a partner and does not appear and successfully dispute his liability as a partner, he is liable, as we have said, to execution on a judgment being recovered against the firm. If, on the other hand, he has been served as manager, he has no business or right to appear. No provision is made for the entry of a conditional appearance; and the poor man is left in the dilemma either of appearing unnecessarily and being put in for costs, or of not appearing and leaving himself liable to execution. This obviously is a result not taken into account by the framers of the rules, and exhibits a state of things calling for early attention.

COLONIAL JUDGES IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

The Act for the better administration of justice in the Imperial Privy Council (3 and 4 Wm. IV., c. 41, Imp.), among other recitals, states that "whereas from the decisions of various Courts of Judicature in the East Indies, and in the plantations, colonies, and other dominions of His Majesty abroad, an appeal lies to His Majesty in Council," and that it is expedient to make certain provisions "for the more effectual hearing and reporting on appeals." It then proceeds to constitute a tribunal for colonial appeals as the "Judicial Committee of the Privy Council," and designates who are to comprise that tribunal, with power to the Crown to appoint certain other judicial persons, who are thus described in s. 30 of the Act:

"And be it enacted, that two members of His Majesty's Privy Council, who shall have held the office of judge in the East Indies, or any of His Majesty's dominions beyond the seas, and who, being appointed for that purpose by His Majesty, shall attend the sittings of the Judicial Committee of the Privy Council, shall severally be entitled to receive, over and above any annuity

granted to them in respect of having held such office as aforesaid, the sum of £400 ($1,946.67) for every year during which they shall so attend as aforesaid, as an indemnity for the expense which they may thereby incur, and such sum of £400 shall be chargeable upon and paid out of the Consolidated Fund of the United Kingdom of Great Britain and Ireland."

The Act is a parliamentary recommendation to the Crown to appoint Indian and colonial judges as members of the Judicial Committee; but so far as it authorized the appointment of colonial judges to the Judicial Committee, it has been a dead letter. The only appointments made by the Crown under the clause of the Act of 1833 cited above were of retired Chief Justices of the Indian courts, and in 1871 those were Sir James W. Colvile and Sir Lawrence Peel, ex-Chief Justices of Calcutta, but we are not aware whether any of them received the pittance of £400 a year authorized by the Act as "an indemnity for the expense" of attending the sittings of the Judicial Committee.

In 1871 the Crown was authorized to appoint four additional judges to the Judicial Committee, but the Imperial Parliament limited the Crown's right of selection to judges of the English courts or retired Chief Justices of the Indian courts, and provided that the salary to be attached to the office should be £5000 sterling ($24,333) a year, or just twelve and one-half times more than the salary of £400 allowed by the Act of 1833 to colonial judges.

One of the appointments under this Act caused a great scandal, and many high judicial functionaries wrote wrathy letters to the English press denouncing the appointment of the Attorney-General, Sir R. P. Collier, to the Judicial Committee, as an evasion of the provisions of the Act, and as a political trick to relieve the Government of an inefficient Attorney-General, and to make way for an abler man, Sir J. D. (now Lord) Coleridge. The statute limited the appointments to English judges, and Sir R. P. Collier was temporarily appointed to a judgeship in the Court of Common Pleas, which he immediately resigned, and was thereupon appointed to the Judicial Committee.

The Indian ex-Chief Justices appointed as paid judges under this Act were Sir James W. Colvile (previously a member), and Sir Barnes Peacock (recently deceased), who had been a retired Chief Justice of Calcutta, each of whom received the salary of £5000 a year authorized by the Act. We are not aware whether Sir Lawrence Peel, who was designated "Indian Assessor," became entitled to any salary. Sir Richard Couch, ex-Chief Justice of Bombay, and Lord Hobhouse, a former member of the Indian Viceroy's Council, were subsequently appointed and are now the representatives of the Indian courts on the Judicial Committee.

In 1876 a further change was made in the composition of the Judicial Committee by the "Appellate Jurisdiction Act, 1876," which provided that whenever any two of the paid judges of the Judicial Committee should die or resign, the Crown might appoint a third "Lord of Appeal in Ordinary," and that on the death or resignation of the remaining two paid judges of the Judicial Committee the Crown might appoint another "Lord of Appeal in Ordinary." The office entitled the judge to a life peerage, and a salary of £6,000 sterling ($29,200) a year.

The House of Lords and the Judicial Committee, as now constituted, have judicial representatives from the English, Irish, Scotch, and Indian judiciary; but there is no representative from any of the great colonies of the Empire. Canada and Australia have the largest populations of any of the colonies, and that of Canada is greater than United Australia, and is about equal in population to that of Ireland, and greater in population than that of Scotland; but the Imperial Parliament have not thought proper to give the judiciary of either great colony preferment to the Judicial Committee of the Privy Council; and their financial estimate of the judicial qualifications they are willing to pay for, or the value they place on colonial judicial assistance to that tribunal may be learned from the salary of £400 a year, which is about equal to the salary paid to each of the junior clerks attached to the Registrar's office. Whilst noting these facts, we shall await a sufficient reason (as heretofore suggested by us) why the colonies or outlying provinces of the Empire should not be represented. It is one of the points on which we are open to conviction.

In 1887 Parliament provided that the salary to be paid to an ex-colonial judge, whenever a qualified one could be found who would be willing to accept the proffered "indemnity for the expense" of attending the Judicial Committee of the Privy Council, might be £800, the same as the salary of one of the senior clerks of the Council, and was embodied in the following amendment:

"Any person who shall in virtue of the 30th Section of the Act of the 3rd and 4th William the Fourth, Chapter 41, attend the Sittings of the Judicial Committee of the Privy Council, shall be deemed to be included as a member of the said Committee for all purposes; and shall, if there be only one such person, be entitled to receive the whole amount of the sums by the said section provided, that is to say, £800 ($3,893.33) for every year during which he shall so attend; but if there shall at any time be two such persons, they shall severally be entitled to the sums provided in the said section (*i.e.*, £400 a year)."

Such is the Imperial estimate of the value of the judicial services of a colonial judge in the Judicial Committee, the Supreme Court of Colonial Appeal. The Lord Chancellor (Lord Halsbury) in moving the clause intimated that the proposed salary of £800 a year was "to induce those with judicial learning and experience, gained in the great centres of administration in India, to give the advantage of them to the Judicial Committee of the Privy Council." The Imperial estimate of the value of the judicial services of police magistrates and county judges in England is that they are worth from £1,500 ($7,300) to £1,800 ($8,760) a year.

It is some satisfaction to those Canadians who have strong views on this subject, to find that the question as to propriety of having colonial judges on the bench of the Imperial Court of Colonial Appeals is attracting some attention in England. Of all the colonies, Canada has sent the largest number of great constitutional questions for adjudication to that great Imperial tribunal; but up to the present none of our able and experienced Canadian jurists have been sought for by the Imperial authorities for appointment to, or have been "requested to attend" the Judicial Committee. And even if the appointment were offered or a request made to a Canadian judge, we think the paltry salary attached to the office, as compared with the salary given in 1871 to Indian judges, which

must be held to presume judicial inferiority in the colonial judges, would necessarily compel a prompt refusal.

Of the various colonial tribunals, those in Canada are vested with a larger power and a more delicate duty than have been given to or can be exercised by the English or any of the other colonial courts. The British North America Act has established two separate and independent legislative and executive sovereignties* with enumerated, and therefore limited, though exclusive powers. Each of these separate sovereignties derives its legislative and executive authority from the same constitutional instrument, and each, although within the same territorial limits, has distinct and defined powers, which prohibit the one from encroaching upon the exclusive functions of the other. The delicate duty of defining the limits and exclusive powers of this intricate and interlaced legislative and executive authority, and of enforcing the constitutional limitations and prohibitions of the B.N.A. Act, are confided to our Canadian judges. The legislative conflicts must necessarily be submitted to the arbitrament of an independent and competent authority. The judicial function of interpreting the laws involves, under our constitution, the higher duty of ascertaining whether a special law of the Dominion or Provincial Legislature is within the legislative authority of the enacting power, and therefore conformable to the constitution. If found to be beyond the grant of legislative power, and therefore *ultra vires*, our judges must declare the legislative enactment void and inoperative. It will scarcely be questioned, therefore, that if Canadian judges have hitherto successfully exercised the responsible power and fulfilled the delicate duty of guarding the constitutional limits of our legislative and executive powers, and have faithfully interpreted the laws, their presence in the Imperial Privy Council would be eminently beneficial, for it would add judicial strength and experience to that tribunal.

We had intended quoting here, as an appropriate ending to the present discussion, the observations of Mr. Stanley Leighton, M.P., in the *Imperial Federation* for May 1st, entitled, "Colonial Judges for the Privy Council," but want of space forbids; it is therefore reserved for our next issue.

COMMENTS ON CURRENT ENGLISH DECISIONS.

(Notes on the April Numbers of the Law Reports—continued).

VENDOR AND PURCHASER—CONTRACT BY LETTERS—SPECIFIC PERFORMANCE.

In *Bellamy* v. *Debenham* (1891), 1 Ch. 412, the Court of Appeal (Lindley, Lopes and Kay, L.JJ.,) affirmed the judgment of North, J., (noted *ante* p. 43), but in doing so, without expressly deciding that there had been no concluded contract, they express considerable doubt whether there was—and the main reason on which they sustained the judgment of the Court below was that the vendor had not got what he contracted to sell, he having contracted to sell the fee, whereas the mines, minerals, clay, gravel, etc., did not belong to him, but were vested in the lord of the manor, and that the vendor not being in a posi-

*The colonial legislatures within the restrictions necessarily arising from their dependency on Great Britain are *sovereign* within the limits of their respective territories: *Story on the U.S. Constitution*, s. 171

tion at the time fixed for completion to give what was bargained for, this was an answer to the plaintiff's claim either for specific performance, or for damages for breach of contract; notwithstanding that, after the defendant had repudiated the contract on this ground, the plaintiff had, before action, got in the outstanding right to the mines, minerals, etc. This case deserves consideration in connection with *Paisley* v. *Wills*, 19 Ont. 303, recently affirmed by the Court of Appeal.

INVESTMENT OF TRUST FUNDS—INSTRUMENT GIVING NO POWER TO VARY INVESTMENTS—POWER TO VARY EXISTING SECURITIES—TRUST INVESTMENT ACT (52 & 53 VICT. C. 32) S. 3—(R.S.O., C. 110, SS. 29, 30.)

In re Dick, Lopes v. *Hume-Dick* (1891), 1 Ch. 423, the Court of Appeal (Lindley, Fry, and Kay, L.JJ.,) refused to follow *In re Manchester Royal Infirmary*, 43 Chy. D. 420 (noted *ante* vol. 26, p. 264), and held that where trustees hold securities under an instrument giving them no power to vary investments, they nevertheless have power to sell such securities and reinvest the proceeds in securities authorized by the Trust Investment Act (see R.S.O., c. 110, ss. 29, 30).

COMPANY—WINDING UP—RECEIVER APPOINTED IN ACTION BY DEBENTURE-HOLDER—SUPERSEDING RECEIVER BY LIQUIDATOR.

In re Stubbs, Barney v. *Stubbs* (1891), 1 Ch. 475, the Court of Appeal (Lindley and Kay, L.JJ.) refused to interfere with the discretion exercised by Kekewich, J., (see *ante* p. 137) in refusing to displace a receiver of a company appointed in an action by debenture-holders in favor of the liquidator of the company, which had been ordered to be wound up. In such a case, where the receiver has been appointed by the Court, there is a discretion as to who shall be the receiver, though it is otherwise where the debenture-holders have themselves appointed a receiver in pursuance of a power so to do. In the present case there was practically nothing for the liquidator to do, except get in a sum of £180 from the shareholders for uncalled capital.

PRACTICE—TRIAL BY JURY—ORD. XXXVI., R. 6, 7 (ONT. JUD. ACT, S. 77).

Jenkins v. *Bushby* (1891), 1 Ch. 484, was an action brought by one mine-owner against another to restrain trespass and for an account of the minerals which had been taken by defendant from the plaintiff's land. The case turned on the question whether the *locus in quo* was part of the plaintiff's estate, or part of the waste of the manor. The plaintiff applied for a trial by a special jury. Stirling, J., refused the application for a jury on the ground that the case would involve the examination of many documents; but on appeal his order was reversed. The Court (Lindley, Lopes and Kay, L.JJ.) thought the importance of a view was so great that a trial by jury ought to be ordered.

WINDING UP—STAYING PROCEEDINGS IN AN ACTION AGAINST THE COMPANY—PRACTICE.

In re General Service Co-operative Stores (1891), 1 Ch. 496, the Court of Appeal (Lindley, Lopes, and Kay, L.JJ.), affirming Kekewich, J., held that notwithstanding the jurisdiction regarding the winding up of companies under the

Winding Up Act (1890) is assigned to the Chancery Division, yet nevertheless when it is necessary to apply to stay proceedings in an action in the Q.B.D. the application must be made to that Division, as that was a jurisdiction conferred by the earlier Act of 1862, and since the Judicature Act the proper branch of the Court to apply to to stay proceedings is that in which the proceedings are being carried on.

TRUSTEE—WILL—INVESTMENT—COMPANY INCORPORATED BY ACT OF PARLIAMENT—COMPANY INCORPORATED BY CHARTER GRANTED IN PURSUANCE OF A STATUTE.

In *Elve* v. *Boyton* (1891), 1 Ch. 501, a testator had empowered the trustees by his will to invest in shares of any company incorporated by Act of Parliament. They invested in the shares of a company which had been incorporated by a charter issued in pursuance of an Act of Parliament, and which company was subsequently by another Act amalgamated with another corporation, whose powers were vested in it; and the question was whether this was an investment authorized by the will. The Court of Appeal (Lindley, Lopes, and Kay, L.JJ.) held that it was, because the company could not have been created by charter with the powers it possessed except by virtue of the Act of Parliament, and therefore the company was a company incorporated by Act of Parliament within the meaning of the will.

MARRIED WOMEN'S PROPERTY ACT, 1882—ESTATE TAIL—ENLARGING BASE FEE—DEED BY MARRIED WOMAN ENLARGING BASE FEE.—R. S. O., c. 132, s. 4, s-s 3: Ib., c. 134, s. 3: Ib., c. 103, s. 3.

In re Drummond & Davie (1891), 1 Ch. 524, an interesting question of real property law was discussed by Chitty, J. Two unmarried ladies, being tenants in tail in remainder, executed a disentailing deed which had the effect of converting the estate tail into a base fee, there being a protector of the settlement, and he not having joined in the deed. The ladies married, after the Married Women's Property Act, 1882, and the protector having died they, intending to convert the base fee into a fee simple, executed a further deed in favor of their grantee. This deed was not acknowledged by them before justices of the peace, nor did their husbands concur in it. Upon a subsequent sale of the property it was objected that this deed was invalid, it being contended that the right to enlarge the base fee into a fee simple was not "property" within the meaning of the Married Women's Property Act, 1882, but a mere power, and therefore a married woman had no power to execute a deed enlarging a base fee, except with the formalities required before the passing of that Act. But Chitty, J., was of opinion that this right of completely unfettering the estate which remains in a tenant in tail who has converted the estate tail into a base fee is "real property" within the meaning of the Married Women's Property Act, and was capable of being conveyed by a married woman under that Act as a *feme sole*, and he therefore held the deed to be valid and effectual.

CONFLICT OF LAW—COMPANY—UNPAID CAPITAL—DEBENTURES CHARGING UNPAID CAPITAL—SCOTCH JUDICIAL PROCESS CHARGING UNPAID CALLS—NOTICE—PRIORITIES.

In re Queensland Mercantile & Agency Co. (1891), 1 Ch. 536, a question of priority arose in a winding-up proceeding, as between rival claimants on the unpaid

capital of the company. On the one side were debenture-holders whose debentures were a charge on the unpaid capital, and on the other creditors who, after the capital had been called but before it had been paid, had arrested the calls on the shares of the company held in Scotland, by proceedings taken in a Scotch court. The holders of the Scotch shares had no notice of the debentures, and according to the Scotch law the arrestment of the calls was equivalent to an assignment with notice to the debtor, and took priority over an earlier assignment without notice; and it was held by North, J., that the claimant under the Scotch process had the first charge on the proceeds of the Scotch shares, notwithstanding that according to the law of England no notice by an assignee to the debtor is necessary as against a subsequent assignee.

PARTNERSHIP—MISREPRESENTATION BY A CO-PARTNER—CONCEALED FRAUD—LIABILITY OF INNOCENT PARTNER—STATUTE OF LIMITATIONS, (21 JAC. I, C. 16).

In *Moore* v. *Knight* (1891), 1 Ch. 547, the plaintiff between the years 1867-1874 had deposited with a firm of solicitors various sums of money for investment. One small sum was invested, the rest were in fact embezzled by a clerk of the firm. Accounts were rendered to the plaintiff and representations made to her by, or on behalf of the firm, so as to lead her to believe that the whole of the moneys had been invested, and interest was paid to her by the firm down to the death of one of the partners in 1877, and by the surviving members of the firm down to 1886. In 1886 the fraud was discovered. The partners having all died, the present action was brought against their representatives. The representative of the partner who died in 1877 set up the Statute of Limitations (21 Jac. 1, c. 16), and also the English Trustee Act of 1888, enabling trustees in certain circumstances to set up the statute as a bar to claims by their *cestuis que trust*. Stirling, J., however, held that the defence was not tenable except as to the money which actually had been invested, and that the effect of misrepresentations by the members of a firm whereby a fraud was concealed, was to make the firm liable as if the representations were true; and that *Blair* v. *Bromley*, 2 Ph. 354, 5 Hare 542, did not proceed upon any principle or rule of equity applicable to trustees, but on the effect of misrepresentations by a partner as affecting the liability of the firm, and was unaffected by the Trustee Act, 1888, and therefore governed the case. He therefore declared the plaintiff entitled to recover against the assets of the firm, and if this proved insufficient, then against the separate estates of the members of the firm, with the exception before mentioned as to the sum actually invested, for which the partners who survived after 1877 only were held liable.

PRACTICE—ARBITRATION—AWARD—ARBITRATOR, MISCONDUCT OF—MOTION TO SET ASIDE AWARD—EVIDENCE—ADMISSION BY ARBITRATOR.

In re Whitely & Roberts Arbitration (1891), 1 Ch. 558, Kekewich, J., held that on a motion to set aside an award evidence of an admission by one of the arbitrators out of Court that he had made his award improperly, as, for example, by collusion, or in consequence of a bribe, is inadmissible. The decision, we may observe, proceeds not of course upon the principle that proof of such misconduct

would not be sufficient to set aside an award, but simply on the principle that an admission by an arbitrator is not evidence of the fact, the admission by a third party being no evidence against anybody but himself, except in certain cases where he is associated with others who are also bound by his admissions.

EVIDENCE—ADMISSIBILITY—PROMISSORY NOTE INSUFFICIENTLY STAMPED.

The only other case is *Ashling* v. *Boon* (1891), 1 Ch. 568, which has no longer, since the repeal of our Stamp Act, much interest for us. It is a decision of Kekewich, J., in which he holds that under the English Stamp Act (33 & 34 Vict., c. 97) a promissory note insufficiently stamped cannot even be used as evidence to prove the receipt of the money for which the note was given.

Notes on Exchanges and Legal Scrap Book.

THE ancient practice of taking oaths has been preserved even in the midst of the greatest corruption, not for the sake of restraining wickedness by religious fear, but to complete the tale of crimes by adding that of perjury.—*Civ. Dei.*, iii. 2.

WE are glad to see that the *Times* is fully alive to the importance of the *Jackson Case*. It now appears to be absolutely necessary to reconsider our whole law of marriage and the relationship of the sexes. The law of breach of promise, by which a man must perform his promise at the risk of his life; the law of the nubile age, by which marriage between a boy of fourteen and a girl of twelve is valid, and the consent of parents or guardians, though nominally required, may be easily misrepresented to exist; the law of liability of a husband for his wife's debts and torts; the law by which a married woman alone of all debtors is exempt from imprisonment, when she can pay her debts but will not; and, lastly, the law of divorce, by which a woman may leave her husband for no reason, good or bad, the day after marriage, with no remedy but a judicial separation—all these and many more points in our law of marriage require immediate and careful consideration and revision.—*The Law Journal.*

THE *Indian Jurist*, published at Madras, is as well-edited a law journal as can be found anywhere. It is a shining illustration of the capacity of our British cousins to adapt themselves to circumstances, and, like the Romans of old, to erect a civilization in strange lands and out of the most uncouth material. There, away out in British India, they have built up a body of law superior in many respects, because untrammelled by ancient precedents, to that enjoyed by the Englishman on his native shore. They have their own legal literature and their own law reports, which latter, by the way, would be quite a curiosity to many of our readers. Think of having to report a case under the title of *Sadashir*

Rayaji v. *Maruti Vithal*, or *Easnara Doss* v. *Pungavanachari*, or *Faki Abdulla and another* v. *Babaji Gungaji*, and having to state as a part of the syllabus that the case of *Rao Karan Singh* v. *Raja Bakar Ali Khan* and *Mohima Chunder Mozoomdar* v. *Mohesh Chunder Neogi* are explained. The case we have before us as we write is one involving a question under the Hindu Statute of Limitations, and we are informed that it is an appeal from an order of remand made by Rao Bahadur G.A. Mankur, "First-class subordinate judge of Thana, A.P." That the appellant's counsel was Shantaram Narayan, who cited the case of *Mohima Chunder Mozoomdar* v. *Mohesh Chunder Neogi*, and that Manekshah Jehangershah argued for the respondent, and cited to the Court the case of *Rao Karan Singh* v. *Raja Bakar Ali Khan*, whereupon Telang, J., delivered the decision of the Court, in which he expresses the opinion that the case of *Rao Karan Singh* v. *Raja Bakar Ali Khan*, relied upon by the learned counsel Shantaram Narayan, should be read in connection with *Gopaul Chunder* v. *Nilmoney Mitter* and *Moro Desai* v. *Ramachandra Desai*, as well as that of *Nawab Mahomed Amanulla Khan* v. *Badan Singh*. Thank heaven, we live in a land where plain *Doe* v. *Roe* and *Smith* v. *Jones* is enough to satisfy the Court. We are not yearning to practise law in Madras, even though so excellent a law journal as the *Indian Jurist* be published there.—*Washington Law Reporter.*

LEGAL FEES IN ENGLAND AND CANADA.—Now and again there appear inquiries in our columns as to the advantages of practising in Canada, and it is always interesting to get facts on these points. Not long ago an English firm were instructed to draw a certain instrument; their charges came to five guineas; an exactly similar document had to be drawn by a Canadian firm, whose charges came only to fifteen shillings, or seven times less than the sum paid to the English firm. If one is to assume that the law forms in Canada are similar to those usual in England, the disparity between these fees is remarkable. Either the Canadian lawyers must do a much larger business than their English brethren, or the fees of the latter must be unduly heavy. Probably the fact is that Canada is much less overridden by officialism than England is, for it may be said without error that many of the items charged in a modern lawyer's bill go into the pockets of the State officials, and but a small percentage is left to remunerate the lawyer.—*The Law Journal.*

THE CLITHEROE CASE.—The history of this now celebrated case, which has caused such great commotion in England, and in which the rights and privileges of a wife have been given such a liberal construction, with the necessary consequence, the curtailment of the power of the husband, is given in brief by the *Central Law Journal*:—"The proceeding was by way of *habeas corpus* on the part of a Mrs. Jackson, directed to her husband, requiring him to bring his wife, 'now detained by him,' before the Court, with a view of determining whether she was actually imprisoned by her husband, and, if so, by what right. The sub-

stance of the return of the writ was that Mrs. Jackson was the lawful wife of Mr. Jackson, but had refused to live with him, and consequently he had taken and detained her in his own house, using no more force or restraint than was necessary for the purpose of so taking and detaining her, in order to have full opportunity of gaining her affections. The Court, consisting of Lord Chancellor Halsbury, Master of the Rolls Esher, and Lord Justice Fry, gave judgment for the wife in long and well-considered opinions. The body of English matrimonial law has not for a long time been enlarged by so important a decision. The time-honored *dicta* of English legal text-books were dismissed by the lord chancellor as 'quaint and even absurd.' Whatever these *dicta* might be, 'there was no case to be found anywhere establishing the proposition that the mere relation of husband and wife gave the husband complete dominion over the wife's person, when her behavior was unaccompanied either by misconduct or the approach of a proximate act of misconduct.' 'No English subject, in fact, had a right,' said Lord Halsbury, 'to imprison any other subject who was *sui juris*, whether she be wife or anybody else.' The legal pith of the case may be stated thus: A husband has no right to restrain the liberty of his wife's person in the absence of any other injury or reasonable cause to apprehend other injury to him than mere loss of her society."

CONSPIRACIES AND RIGHT OF ACTION.—If, in speculating for "differences," a man sells on the Stock Exchange shares which he has not got, and on being compelled to deliver them has to buy them at an exorbitant price, he cannot sue any persons who, by false representations to any particular person or to the public generally as to the value of the shares, may have unnaturally forced the price up. Such appears to be the result of the judgment of the Court of Appeal in *Salaman* v. *Warner and others*, in which the plaintiff was a broker who claimed more than £7,000 damages against the defendants, who were the promoters, stockbrokers, and financiers of Warner's Safe Cure Company, "for fraudulently rigging the market," and thereby causing him to lose that sum in fulfilling his contracts to deliver shares. The High Court held that no specific fraud had been committed which affected the legal rights of the plaintiff. "The fraud, if any," observed Mr. Justice Day, in delivering judgment, "which was practised on the committee of the Stock Exchange is not one which the plaintiff can connect with the original transaction out of which his losses occurred." "The plaintiff," said the Master of the Rolls, "claimed a right of action because, as he said, the defendants had not told some one else, who was in no way connected with the plaintiff, the truth. There is no such right as this by the law of England." Upon the authorities there is no doubt of the correctness of these views, *Bedford* v. *Bagshawe*, 4 H. & N. 538, so far as it points the other way, having been overruled in *Peek* v. *Gurney*, 43 Law J. Rep. Chanc. 19. The Court of Appeal has further and expressly laid down that no civil action can be maintained for a conspiracy unless the conspirators conspire to do something against the rights of the plaintiff, and effect their purpose and commit a breach of those

rights, the Master of the Rolls stating that the fact of a conspiracy does not increase a right of action in the least—a statement which should be compared with the judgment of the Exchequer Chamber in *Gregory* v. *The Duke of Brunswick*, 16 Law J. Rep. C.P. 35, in which a declaration for conspiracy to hoot an actor off the stage was held good.—*The Law Journal.*

VERDICTS OF JURIES.—A case which occurred a short time ago in England, at the Chester Assizes, shows the inexpediency and injustice of detaining a jury for any excessive period in the hope of getting a verdict. A married woman named Cutler had been convicted of perjury, the trial lasting fifteen hours, and the verdict being found shortly after midnight. The presiding judge, Mr. Justice Vaughan Williams, sentenced the prisoner to five years' penal servitude. The case excited much comment, and an effort was made to obtain the views of the jury, in order to press the Home Secretary for a reduction of the punishment. One juryman writes: "I was one of the five to hold out against the verdict of guilty. You will naturally inquire why I gave way. One reason was that we had sat from 9.30 a.m. until midnight, and it was of great importance that I should be at home the following morning. Had it not been for that, I would have sat for a week without giving way, because I considered that there was a doubt in the case, and that the woman should have the benefit of it. I did not think the sentence would have been more than six months at the most." Another juryman says: "I was very reluctant in convicting the prisoner, as there are very grave doubts in the case. For myself, I was in favor of giving the prisoner the benefit of the doubt." A third juryman writes: "I think there has been a miscarriage of justice. Although a verdict of guilty was returned, many of us were very hard to convince, but owing to the late hour we felt that a verdict must be arrived at. As to the sentence, I should like it to be considerably reduced or entirely cancelled." A fourth juryman says that the verdict turned on certain plans of premises, and he was so dissatisfied with the sentence that on the following day he went to inspect them, and he made up his mind at once that, had he seen the premises prior to the trial, he certainly would not have given a verdict of guilty. He adds explanatorily: "The jury were about equally divided, but none were strongly against the prisoner."—*Montreal Legal News.*

LYNCH LAW.—Mr. Justice Harrison, one of Her Majesty's judges in Ireland, recently declared on the bench at the Galway Assizes that he wondered why the people did not resort to lynch law to put a stop to infringements of public peace. Mr. Dillon brought the words of the magistrate before the House of Commons, where they created some sensation. In the debate which followed, reference was made rather satirically to "American methods of justice," which were not desired under the "saner and more conservative institutions of the United Kingdom." The incident and debate have brought out the well-authenticated fact that lynch law did not originate in the United States, but in the United

Kingdom, and, oddly enough, in Galway; and still more oddly, that its modern significance is not precisely what it originally meant.

It is true that Webster's dictionary attributes its origin to the peculiar method of a Virginia farmer named Lynch, who was accustomed to dispensing with legal forms when administering what he supposed was justice with a whip on the bare backs of persons who interfered with his rights.

It is also incorrectly noted in Reddall's "Fact, Fancy, and Fable," and in Edwards' "Words, Facts, and Phrases." In the "Dictionary of Phrase and Fable" it is doubly ascribed to the true source and to the false Virginian source.

It is correctly given in the "Biographical Dictionary of Ireland," by Lewis, printed in London in 1837. James Lynch Fitzstephen was warder, in 1493, of the town of Galway, which had a considerable commerce with French and Spanish ports. His son had a friend, a Spaniard, whom he believed to have alienated the affections of his betrothed wife, and young Fitzstephen, or Lynch, as the family name ran, killed him at sea. Lynch was condemned to death, and sentenced by his father, upon whom the cruel duty fell on account of his office. The people sympathized with the son, and, perhaps, with what they believed to be the real feeling of the father, and prepared to prevent the execution. The executioner refused to do his work. The father, resolved that the law should be obeyed, hanged the condemned boy with his own hands out of the window of his house.

In 1624 a monument of this episode, comprising a skull and crossbones carved on black marble, was erected and is now on the wall of St. Nicholas churchyard.

It was the mob, therefore, and not James Lynch, who proposed to break the law or suspend its usages and force; but the caprice of time has transferred the epithet to lawless deeds. The coincidence acquires further interest from the fact that it is also from Ireland the English language has derived another word descriptive of passive abrogation of law—boycott. The methods and objects implied in both words, however, are as old as civilization. It is only the descriptive appellatives that are modern.—*Chicago Herald.*

Reviews and Notices of Books.

Principles of the English Law of Contract and of Agency in its Relation to Contract. By Sir William R. Anson, Bart., D.C.L., of the Inner Temple, Barrister-at-Law, etc. Sixth edition. Oxford: The Clarendon Press, 1891.

This work is recognized almost universally as the best epitomized discussion of the Law of Contract in existence. The fact of its use by students of all years as a text-book is not the worst recommendation it could receive. Several chap-

ters have been entirely rewritten, and all have been brought up to date. The author, in his preface, refers to the references necessitated both to the *Times* Law Reports and the *Law Times* Reports, and says that the apology should come, not from him, but from the editors of the reports "whose selection of cases and manner of reporting are a grievance to all concerned in the study and practice of the law."

Correspondence.

GRAND JURIES.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—In the last number of this journal you published an article from the pen of a writer who has evidently bestowed some attention on the question as to what feasible substitute can be provided in place of Grand Juries. His suggestions contain the germ of what might probably be elaborated into a satisfactory scheme for supplying all that is needful in the Grand Jury system, and at the same time be more efficient and less open to be perverted by occult influences.

There are two things to be guarded against, (1) the unnecessary subjection of any man to the trouble, annoyance, and loss of liberty and expense involved in his being, without reasonable cause, submitted to the ordeal of a public prosecution for any alleged criminal offence; and (2) the prevention of the failure or perversion of justice by reason of cases being burked which ought to be submitted to public investigation. Bearing in mind these two things, it is obviously most essential that no public functionary should be permitted to exercise any autocratic power in matters of this kind. Should it be determined to transfer the functions of the Grand Jury to the shoulders of an individual, the latter must be surrounded by such checks as will effectually guard against the exercise of his powers in an arbitrary or capricious manner. It seems essential that the functionary, whoever he may be, should be brought face to face with the witnesses for the prosecution in the same manner as the Grand Jury is; and that though his preliminary investigation should be conducted in private, yet that a record should be kept of the testimony given before him, and that in every case this testimony should be preserved and transmitted to the Attorney-General's Department, together with the written report of the functionary making the investigation, in order that his conduct may at all times be open to the fair and reasonable criticism which is absolutely essential for the safety of the public and the due administration of so important a public duty. One of the greatest defects in our Grand Jury system is that Grand Juries are not amenable to public criticism for the way they discharge their duty. They are practically autocratic.

The writer of the article proposed that one such officer should be appointed for each circuit. Whether that would be an adequate number is perhaps open to

doubt, but at any rate counties might be grouped in such a manner as to enable one such officer to discharge the required duty for several counties. The proposal to pay such officers by fees seems to me to be undesirable. Any scheme whereby any individual is required to undertake the duty of a Grand Jury should be so devised as to remove as far as possible every motive for any such officer to authorize a prosecution save a supreme regard for public welfare and the due vindication of the law of the land. The possible imputation that his action was instigated by the fact that a prosecution would bring him so much more pay in the way of fees ought to be carefully guarded against. Such a functionary, to fulfil his duties satisfactorily to himself and the public, must, like Cæsar's wife, be above suspicion. The men chosen for such positions should have all the qualities calculated to inspire public confidence—undoubted integrity and a reputation for fair dealing, and a judicial bent of mind.

The appointment of such an officer as has been suggested should be made in such a way as to insure efficiency. It would never do to give any appointee a life term of his office, as that would almost inevitably lead to men continuing to hold the office after they had ceased to be capable of efficiently discharging its duties.

As the appointment of such an officer would relieve the counties of the expense of summoning and paying the Grand Jury, they might not unreasonably be required to assume the duty of paying the salary of such an official, if one were appointed.

H.

Proceedings of Law Societies.

LAW SOCIETY OF UPPER CANADA.

TRINITY TERM, 1890.

The following is a *résumé* of the proceedings of Convocation during the above term:—

The following gentlemen were called to the Bar, viz.:

September 8th.—Arthur Cyril Boyce, with honors and bronze medal; Alexander James Armstrong, William Henry Nesbitt, Augustus James Jackson Thibeaudeau, William Alexander Logie, Archibald Crozier, George Henry Hutchison, Hiram Erskine Stone, Philip Henry Bartlett, Archibald Abbott, Walker Lewis Edward Marsh, Saxon Bismarck Arnold, Thomas George Alexander Wright, William John Hanna, Archibald Bain McCallum, Arthur Henry O'Brien, John Jacob Drew, Francis William Maclean, John Almon Ritchie, Edwin Owen Swartz, Isaac Greenizen, Colin Fraser, and Alexander David Crooks (who passed his examination in Easter term).

September 13th.—Edmund Baird Ryckman, with honors and gold medal, and Alexander James Keeler.

The following gentlemen were granted Certificates of Fitness as Solicitors, viz.:

September 8th.—A. J. Armstrong, S. B. Arnold, H. Carpenter, A. Crozier, J. J. Drew, C. Fraser, W. J. Hanna, W. J. Hatton, A. J. Keeler, W. A. Logie, E. B. Ryckman, R. M. Thompson, A. Abbott, J. H. McGhie, A. D. Crooks (passed Easter term, 1890).

September 9th—H. E. Stone, T. G. A. Wright, W. H. Nesbitt, M. R. Allison, E. U. Sayers, F. W. Maclean.

September 13th.—I. Greenizen, W. H. Kennedy, J. Fraser.

The following gentlemen passed the Second Intermediate Examination, viz.: E. Pirie, W. E. Gundy, N. P. Buckingham, J. G. Harkness, J. A. Harvey, U. A. Buchner, H. B. McGiverin, J. F. Carmichael, C. B. Rae, J. B. Ferguson, G. C. Hart, and W. A. Cameron, L. G. McCarthy, S. S. Reveller, as students-at-law *only*.

The following gentlemen passed the First Intermediate Examination, viz.: R. J. Sims, W. McFarlane, G. E. J. Brown, J. McKay, H. M. Graydon, H. D. Smith, C. T. Sutherland, A. E. Fripp, E. F. Burritt, G. T. Copeland, C. C. Fulford, M. A. Brown, D. Campbell, T. A. Duff, N. H. McIntosh.

The following gentlemen were entered on the books of the Society as Students-at-Law and Articled Clerks, viz.:

Graduates—Wm. Robert Givens, Jno. Lamont, And. Bethel Carscallen, Jno. Gladstone Campbell, Jno. Lynden Crawford, Fred. Marshall Brown.

Matriculants—Jas. Wilson Hannon, Robert George Bourns, George Henry Bradshaw, Avery Casey, Ed. Chas. Pinckney Clark, Edwin Coulson Clark, Thos. Coleridge, John Frederick Faulds, Frank Ford, Fred. Charles Kingston, Frank McMurray, Arth. Murray Panton, Sam. Price, Bernard Wm. St. Denis Thomson, David Whiteside.

Law School Examinations.

The following gentlemen passed the First Year Law School Supplementary Examination, viz.:—J. H. Coburn, W. D. Earngey, V. M. Hare, and E. C. Senkler.

The following gentlemen passed the Second Year Law School Supplementary Examination, viz.:—J. N. Anderson, K. H. Cameron, S. A. C. Greene, J. H. D. Hulme, J. A. Mather, E. L. Middleton, L. V. McBrady, R. G. H. Perryn, and G. R. Sweeny.

Monday, September 8th.

Convocation met.

Present—Messrs. Bruce, Cameron, Foy, Hoskin, Kingsmill, McMichael, Meredith, Moss, Osler, and Shepley.

In the absence of the Treasurer, Mr. Moss was appointed Chairman.

The minutes of last meeting of Convocation were read and approved.

Mr. Osler, from the Committee on Reporting, reported that in consequence of severe illness Mr. Boomer will be unable to perform his duties for over two months, and recommended that he be granted leave of absence for three months from 1st September without deduction of salary, and that Mr. E. B. Brown be appointed to do his work in the meantime, being paid therefor at the rate of fifty dollars a month from the 1st of September.

Ordered for immediate consideration.

Adopted, and ordered accordingly.

Mr. Kingsmill, from the Legal Education Committee, presented a Report on the subject of the number of Examiners-in-Law.

Ordered for consideration to-morrow.

Mr. Kingsmill, from the same Committee, presented a Report on the cases of J. A. Murphy and William Johnston, recommending an amendment of Rule 142. Also in the matter of proposed legislation as to admission to practise of certain barristers; also in the matter of proposed legislation as to the admission to the Bar of persons holding the position of Minister of Justice of Canada.

Ordered for consideration to-morrow.

Mr. Kingsmill gave notice that he will to-morrow introduce a Rule to amend Rules 38 and 147, as regards the number of Examiners.

The petitions of Messrs. C. R. McKeown, L. P. Duff, and D. R. Tate were read.

Ordered, that they be referred to the Legal Education Committee.

The Secretary was directed to acknowledge the receipt of F. A. T. Dunbar's communication.

The letter of Messrs. Parkes & Gunther, complaining of the conduct of a student-at-law, was read.

Ordered, that it be referred to the Discipline Committee to report whether a *prima facie* case has been shown for enquiry.

The Report on honors in connection with call to the Bar was read.

Ordered, that it be referred to a Special Committee composed of Messrs. Foy, Bruce, and Kingsmill.

Mr. Hoskin, from the Discipline Committee, in the matter of the complaint against Mr. B——, reported that a *prima facie* case had been shown.

Ordered for consideration on Saturday, 13th September.

Mr. Foy, from the Special Committee to whom was referred the Report of the examiners on honors, reported as follows:

That Messrs. E. B. Ryckman and A. C. Boyce are entitled to be called with honors, and that the former is entitled to a gold medal and the latter to a bronze medal.

The Report was received, ordered for immediate consideration, and adopted.

Ordered, that the above named gentlemen be called with honors, and that Mr. Ryckman do receive a gold medal and Mr. Boyce a bronze medal.

Tuesday, September 9th.

Convocation met.

Present—Messrs. Beaty, Bell, Foy, Hoskin, Kingsmill, Mackelcan, Martin, Meredith, Morris, Moss, Murray, Osler, and Purdom.

In the absence of the Treasurer, Mr. Martin was appointed Chairman.

The minutes of last meeting were read and approved.

The petition of F. B. Fetherstonhaugh was received and read.

Ordered, that it be referred to the Legal Education Committee.

The report of the Legal Education Committee on the subject of the number of examiners was then considered.

Ordered, that it is expedient to increase the number of Examiners-in-Law to three.

Mr. Kingsmill introduced a Rule to amend Rules 38 and 147, as regards the number of examiners, and moved, seconded by Mr. Mackelcan, the first reading of the Rule.—Carried.

On motion, the Rule was read a second and third time and adopted unanimously as follows:

Sub-section 6 of Rule 38 is hereby amended by substituting "three" for the word "two" in that Sub-section, and Rule 147 is hereby amended by substituting "three examiners" for "two examiners" in the last paragraph thereof.

Ordered, that the advertisement be inserted calling for applications for three examinerships, to be sent in by 18th September at noon, and a call of the Bench ordered for the 19th inst., to make the appointments.

The consideration of Mr. Osler's notice of motion on the subject of the new Law School building was adjourned till Saturday next, on the understanding that it was then to be again adjourned after such discussion as may be practicable; Mr. Storm, the architect, to attend if notified.

Saturday, September 13th.

Convocation met.

Present—The Treasurer and Messrs. Christie, Hoskin, Irving, Kerr, Kingsmill, McMichael, Mackelcan, Meredith, Morris, Moss, Murray, Osler, and Shepley.

The minutes of last meeting were read and approved.

The consideration of Mr. Osler's motion that the proposed new Law School should be of a moderately ornamental character, designed to contain the following rooms:—One hall, seating two hundred; two lecture rooms, seating one hundred each; a library, a students' reading-room, cloak-room, closets, four lecture-rooms, principal's room and ante-room, two examiners' rooms; heating to be independent of Osgoode Hall, and that plans and elevations of such building be submitted next term by the architect, the expenditure upon such building and furniture to be about fifty thousand dollars, was, pursuant to order, taken up and discussed at length, and after such discussion, adjourned to the next meeting of Convocation.

Mr. Irving, for Mr. Shepley, presented the Report of the Special Committee on the hours, order and convenience of business, which was as follows:

The Special Committee appointed by Convocation on 23rd November, 1889, to consider and report on the question whether and how the hours of business and the order and arrangement

thereof can be modified so as to secure greater convenience in the conduct thereof, beg leave to report as follows:

On the first and second days of term, Convocation shall sit at 10 a.m., and on other business days of Convocation at 11 a.m.

On the first and second days of term, during the hour between 10 and 11 a.m., three members of Convocation shall be a quorum, and shall have power to transact business hereinafter specified.

1. *On the First Day of Term:*

(1) Reading the minutes of last meeting of Convocation.

(2) Reports of the examiners on the examination of candidates for call, received, read, and approved, or otherwise disposed of.

(3) Secretary's report on standing of candidates.

(4) Reports of the examiners on the examination of candidates for admission as Solicitors, received, read, and approved, or otherwise disposed of.

(5) Reports of the examiners on the Intermediate Examinations, received.

(6) Reports of the Committee on Legal Education on admission of students-at-law and articled clerks, received and read.

(7) Reports of Standing or Special Committees received and read, and a time appointed for the consideration or adoption of the same.

(8) Petitions received, read, and referred.

(9) Communications received, read, and disposed of.

(10) Consideration of any other business specially appointed for the first day of term.

(11) Motions of which previous notice has been given.

(12) Notices of motion.

(13) Second reading of draft rules..

2. *On the Second Day of Term:*

(1) Reading the minutes.

(2) Reports of Committees on petitions respecting call of barristers, admission of solicitors, or respecting students or clerks, or their examinations; or on special cases under the Rules 206 to 213 inclusive, and the consideration or adoption of the same, and of the reports of the examiners on the Intermediate Examinations.

(3) Special reports from the examiners.

(4) Such items of the business authorized to be transacted on the first day as may be unfinished.

It shall be the duty of the Treasurer or Chairman for the time being to defer until after the hour of 11 a.m. the consideration of any question or matter arising out of the business hereinbefore specified which requires special consideration, or is not of a formal character, or is reported by the Legal Education Committee as fit to be deferred.

It shall be the duty of the Treasurer or Chairman for the time being to announce to Convocation at the hour of 11 o'clock on the first and second days of term, and at the opening of Convocation on other business days of Convocation, any special or important matters on the order of business for the day, and to take the sense of Convocation as to the order of disposition of the same.

Signed on behalf of the Committee,

G. F. SHEPLEY, *Chairman.*

The Report was received and ordered for immediate consideration.

Mr. Mackelcan proposed to strike out so much of Section 2 of the work to be done on the second day as relates to reports of Committees.—Lost.

The Report was adopted.

Mr. Irving moved for leave to bring in Rules in pursuance of the report as follows:

Rule to amend Rules 11, 15, 23 and 24:

Rule No. 11 is amended by inserting after the word "quorum," "except on Monday and Tuesday of the first week of term, during the hour between 10 and 11 o'clock in the forenoon, during which hour any three Benchers shall be a quorum," and.

Rule No. 15 is amended by striking out the words "half-past ten" in the fourth line thereof and inserting after the word "meeting" in the said line, "on Monday and Tuesday of the first week, ten o'clock in the forenoon, and on other standing Convocation days, eleven."

Rule No. 23 is amended by inserting after the words "on the first day of term," "during the hour between ten and eleven o'clock in the forenoon, the matters numbered in the said Rule 1, 2, 3, 5, 6 and 7."

Rule No. 24 is amended by inserting after the figure 24, "on the second day of term during the hour between ten and eleven o'clock, the matters numbered 1, 2 and 4 and the following matter, such items of the business authorized to be transacted on the first day as may be unfinished," and by inserting after paragraph 11 of Rule 24 as follows:

"24 A. It shall be the duty of the Treasurer or Chairman for the time being to defer until after the hour of eleven o'clock the consideration of any question or matter arising out of the business hereinbefore specified which requires special consideration or is not of a formal or routine character or is reported by the Legal Education Committee as fit to be deferred."

"24 B. It shall be the duty of the Treasurer or Chairman for the time being to announce to Convocation at the hour of eleven o'clock on the first and second days of term and at the opening of Convocation on other business days of Convocation, any special or important matters on the order of business for the day, and to take the sense of the Convocation as to the order of disposition of the same.—Carried."

Mr. Irving moved that the Rules be read a first time.

Ordered for a second reading at the next meeting of Convocation.

Mr. Hoskin, from the Discipline Committee, reported on the reference of the complaint of Messrs. Parkes & Gunther against Mr. W——, that a *prima facie* case had been made for enquiry.

Ordered for immediate consideration, and adopted.

Ordered, that the said complaint be referred to the Discipline Committee for enquiry and report, according to the Rules of the Society.

Mr. Hoskin, from the same Committee, reported on the case of Mr. B——e, referred to them for enquiry, and the letter of Mr. Bowes, withdrawing the complaint, also referred, recommending that under the circumstances no further action be taken, and that the order of reference be discharged.

Ordered for immediate consideration, adopted and ordered accordingly.

Mr. Hoskin, on the complaint of Messrs. Riddell and Hunter against a solicitor, brought up the Report of the Committee on Discipline, presented to Convocation on 8th September, and ordered to be taken into consideration to-day, moved the adoption of the Report to the effect that a *prima facie* case had been made for enquiry.

Adopted.

Ordered, that the above complaint be referred to the Committee for enquiry and report, according to the Rules.

The letter of the Principal to Mr. Moss was read and referred to the Finance Committee for immediate action.

Mr. Moss presented a Report from the Legal Education Committee, as follows:

(1) The Committee have considered the petition of Mr. J. A. Murphy and the papers accompanying it, and the communication of Mr. William Johnston, with reference to the application of Rule 142 to their respective cases. The Committee are of opinion that this Rule ought not to apply retrospectively, and, in order to remove all doubt upon the point, recommend that the Rule be amended by adding thereto the words, "But this Rule shall not apply to students-at-law who were admitted prior to Hilary Term, 1889."

(2) The Committee have also had under consideration the communication of the Honorable the Attorney-General, referring to a proposed amendment of the "Act respecting Solicitors," so as to permit the admission to practice as solicitors of certain barristers who have not served under articles as at present required by the Act.

The Committee recommended that Convocation give its concurrence to an amendment to the effect set forth in the annexed draft. This, the Committee is of opinion, will enable Convocation to deal with all such cases as may arise.

(3) The Committee have also had under consideration the question of the propriety of applying for legislation similar to that passed by the Legislature of the Province of Quebec, providing for the admission to the Bar of Ontario of any person who is or has been or shall hereafter hold the office of Minister of Justice of Canada, and they recommend that such legislation be procured, and suggest the annexed draft amendment to the "Act respecting Barristers-at-Law" as sufficient to meet the case.

Ordered for immediate consideration.

Ordered that the 2nd and 3rd clauses be considered at the next meeting of Convocation.

The first clause was adopted.

Ordered, that the subject of providing an Annual Official Law List for Ontario be referred to the Reporting Committee, with instructions to report a plan for the consideration of Convocation.

Mr. Moss moved for leave to introduce a Rule in pursuance of the first paragraph of the Report of the Legal Education Committee, adopted this day.

Ordered accordingly.

The Rule was introduced, and is as follows:

Rule to amend Rule 142: Rule 142 is hereby amended by adding thereto the words, "But this Rule shall not apply to any such student who was admitted prior to Hilary Term, 1889."

Ordered, that the Rule be read a first time.

Ordered, that the said Rule be read a second time at the next meeting of Convocation.

Friday, September 19th.

Convocation met.

Present—The Treasurer, Sir Adam Wilson, Kt., and Messrs. Beaty, Bruce, Britton, Foy, Hoskin, Irving, Kerr, Lash, McCarthy, McMichael, Macdougall, Martin, Meredith, Morris, Moss, Murray, Purdom, and Shepley.

The minutes of last meeting were read and approved.

Mr. Moss, from the Legal Education Committee, presented a Report.

In the case of Henry White, recommending that his Second Intermediate Examination, taken in Hilary Term, 1890, be allowed as of that term notwithstanding the previous direction of Convocation.

Ordered for immediate consideration and adopted.

In the case of W. P. McMahon, recommending that the petition be reserved until next term and be then brought up for favorable consideration as to the allowance at that time of the final examinations already passed.

Ordered for immediate consideration and adopted.

On the petition of D. R. Tate *et al*, as to their attendance on the Law School for their second and third years, recommending that each of the petitioners and others in a similar position may exercise an option as to whether they shall attend the course of the school for their second year in the year 1890 or in the year 1891, on signifying their option by letter to the Principal on or before the 6th October,

Ordered for immediate consideration and adopted.

Ordered, that the petitioners be notified of the decision by the Secretary, and that he do cause a notice of the same to be put up in the Library and the Law School.

On the petition of L. P. Duff *et al*, recommending that they be allowed to take the Second Intermediate Examination in November next, under the old curriculum, taking the Law School course in the third year for 1890-91, and that the examination in that course may stand for their final examinations,

Ordered for immediate consideration and adopted.

Ordered, that the order of the day for the appointment of examiners for the Law School be now taken up.

Mr. Moss presented a Report showing the names and date of call to the Bar of each of the applicants.

Messrs. M. G. Cameron, F. J. Joseph, and A. W. A. Finlay, were then elected examiners by Convocation.

The Report of Mr. McCarthy's Special Committee, as follows, was then taken up:

Report of Special Committee appointed 29th November, 1889, to consider and report on the question of unauthorized persons practising in the Surrogate Courts, as set forth in the letters of Messrs. Carroll, Beaumont, and Ross.

Your Committee to whom was referred the letters of Mr. Carroll, accompanied by communications from Messrs. Beaumont and Ross, charging that Mr. P. Heaslip is practising in the way of procuring probate of wills in the Surrogate Courts, for enquiry, beg leave to report:

(1) That it is the right of the members of the Society to call upon it to protect the profession against the unlawful encroachments of those who, not belonging thereto, practise or assume to practise in legal matters contrary to the statute in that behalf, and that the Society is bound to assume the burden of prosecuting such offenders.

(2) That no prosecution, however, should be undertaken unless authorized by Convocation upon the report of a Committee by whom the complaint and the evidence in support thereof has been investigated, and such Committee may, if it think fit, obtain the assistance of the Solicitor in making such investigation.

(3) That with reference to the complaint against Mr. P. Heaslip, your Committee has made no investigation as to the alleged violation of the statute, but your Committee is of opinion that a

prima facie case is presented, and that, if the facts are as stated, he did act as a solicitor in the Surrogate Courts in preparing and presenting papers to obtain probate, and in so doing he did commence a proceeding in a Court of Civil Jurisdiction contrary to the statute.

All which is respectfully submitted,

(Signed) D'ALTON MCCARTHY,
Chairman.

Mr. McCarthy moved the adoption of the Report.

Ordered to be taken by paragraph.

On the first clause, Mr. McCarthy moved that the first paragraph be amended by striking out after the word "Society" where it last occurs the words "is bound to," and inserting the words, "in cases thought by Convocation of sufficient moment should."

Mr. Macdougall moved that the further consideration of the Report be deferred until the first Tuesday of next term.—Lost.

The amendment was adopted.

The clause as amended was adopted.

The second clause was adopted.

Mr. McCarthy moved to add to this clause the following words: "But as the offence, if any, was committed before the adoption of the Rule proposed in the Report, it is recommended that no further action be taken thereon by Convocation."

The clause as amended was adopted.

The Report as amended was adopted.

Mr. Lash (for Mr. Hoskin) presented the petition of the Osgoode Lawn Tennis Club, praying for relief.

Mr. Lash proposed that the petition be referred to the Finance Committee to report to Convocation.

Mr. Moss moved that the order of the day for the consideration of the Report of the Legal Education Committee on the subject of proposed legislation do stand to the second day of next term.

On the order of the day for the further consideration of Mr. Osler's motion as to the erection of a Law School building,

It was ordered that the question be deferred till after a further report of the Select Committee, already ordered, on the subject, and that they be requested to report further on the subject on the first day of next term.

On the order of the day for the second reading of the Rules as to the order of business, the same were read a second and third time and adopted.

Mr. Moss, pursuant to order, moved the second reading of the Rule amending Rule 142.

The Rule was read a second time and third time, adopted, and is as follows:

Except in special cases provided for by any statute, students-at-law who are not articled clerks shall actually and *bonâ fide* attend in a barrister's chambers for the same respective periods as articled clerks are required to serve under articles, but this rule shall not apply to any such student who was admitted prior to Hilary Term, 1889.

Mr. Moss presented a Report from the Legal Education Committee:

In the case of Mr. S. M. Evans, recommending that the prayer of his petition be not granted.

In the case of Mr. G. F. Downes, recommending that the prayer of his petition be not granted.

In the case of J. F. Macdonald, recommending that he be allowed to present himself for his final examinations in November, provided he attends the Law School meanwhile.

In the case of C. R. McKeown, recommending that he be admitted as a student-at-law as of this term on producing to the Secretary and Chairman of the Committee proper evidence of his having received his degree of B.A., as the result of the May and Supplementary September Examinations.

In the case of A. C. Boyce, recommending that his Certificate of Fitness be granted on his producing to the Secretary proper proof of the completion of his service.

In the cases of J. B. Quinton, recommending that the prayer of his petition be not granted.

In the case of W. B. Mills, recommending that his examination be not allowed.

In the case of F. B. Fetherstonhaugh, to the effect that the Rule of 1885 should apply to his case, and that the prayer of the petition should not be granted.

The Report was ordered for immediate consideration and adopted.

Mr. Meredith gave notice for the second day of next term of a motion for the amendment of the Rules, with a view to putting graduates of the Royal Military College on same footing as graduates of Universities.

Convocation adjourned.

J. K. KERR,
Chairman Committee on Journals.

DIARY FOR MAY.

1. Fri.....St. Philip and St. James.
2. Sat.....J. A. Boyd 4th Chancellor, 1881.
3. Sun.....*Rogation Sunday.* Mr. Justice Henry died, '88.
5. Tues.....Supreme Court of Canada sits. First Intermediate Examination.
7. Thur....Ascension Day. Second Intermediate Exam.
8. Fri.....York evacuated by U. S. troops, 1813.
10. Sun.....*Sunday after Ascension.* Indian Mutiny, 1857.
12. Tues.....Court of Appeal sits. Gen. Sess. and County Ct. Sitgs. for trial in York. Solicitors' Ex.
13. Wed.....Barristers' Examination.
17. Sun.....*Whitsunday.*
18. Mon.....Easter Term commences. H.C.J., Q.B.D., and C. P. D. Sittings begin. Law School Examination, 3rd year (Honors), begins.
21. Thur....Confederation proclaimed, 1867.
22. Fri.....Earl Dufferin, Governor-General, 1872.
24. Sun.....*Trinity Sunday.* Queen Victoria born, 1819.
25. Mon.....Princess Helena born, 1846.
27. Wed.....Habeas Corpus Act passed, 1679. Battle of Fort George, 1813.
28. Thur.....Law School Exam., 3rd year (Pass), begins.
29. Fri.....Battle of Sackett's Harbor, 1813.
31. Sun ...*1st Sunday after Trinity.*

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

Div'l Court.] [March 6.

PRATT *v.* BUNNELL.

Husband and wife—Dower—Bar of, in mortgage—Conveyance of equity of redemption by husband alone—Rights of wife—R.S.O., c. 133, ss. 5, 6.

Held, that under ss. 5 and 6 of the Dower Act, R.S.O., c. 133, a wife who joins to bar dower in a mortgage of land made by her husband to secure part of the purchase money is entitled to dower notwithstanding a conveyance by him of the equity of redemption without her concurrence; that the wife so joining in the mortgage is not merely a surety for her husband, and that she is entitled to dower out of the surplus only of the land or money left after satisfying the mortgage debt.

Re Hague, 14 O.R. 660; *Re Croskery*, 16 O.R. 207; and opinion of PATTERSON, J.A., in *Martindale* v. *Clarkson*, 6 A.R. 1, dissented from.

Judgment of ARMOUR, C.J., reversed.

Middleton for the plaintiff.

Langton, Q.C., for the defendant Bunnell.

Snow for the defendant Gordon.

Div'l Court.] [March 6.

COFFIN *v.* NORTH AMERICAN LAND CO.

Statute of Limitations—Possession of land—Tenancy—Payment of taxes—Owners putting up new fence—Entry—Resumption of possession—Acts of possession—Sufficiency of summer crops—Drawing manure in winter—Vacant possession in winter.

In 1857 or 1858 J. entered upon the land in question in this action as tenant to the true owners, upon the terms that he should pay the taxes, and he cultivated the land during his occupation. In the autumn of 1864 he gave up the place to the plaintiff, who paid him something for improvements, and in the spring of 1865 began to work upon it, living upon and occupying an adjoining lot of land, separated by a fence. The plaintiff disclaimed any knowledge of J.'s tenancy, and said that he entered as a purchaser of J.'s rights as a squatter, with the intention of acquiring a title by possession. In 1868 the true owners pulled down an old fence and put up a new one upon part of the land in question. In 1877 the plaintiff executed a writing under seal whereby he agreed to lease the land from the true owners and to pay as rent the taxes thereon, and to give up possession when requested. From the time the plaintiff bought out J. till 1884, when he ceased to use or occupy the land, he grew crops and vegetables upon it in the summer, and did nothing at all in the winter except draw manure upon it, which he spread in the spring.

Held, following *Finch* v. *Gilray*, 16 A.R, that the mere fact that the plaintiff paid the taxes was not sufficient to keep the right of the owners alive against him; but what was done by the owners in 1868 was an entry upon the land in the capacity of owners, an assertion of their rights as such, and a resumption of possession for the time being, before the statute then in force had given a title to the plaintiff, and it furnished a new starting point; and, further, that what the plaintiff did upon the land did not show such a possession as entitled him to assert that he had acquired a title as against the true owners; the acts done in the winter did not constitute an occupation of the property to the exclusion of the rights of the true owners, but were mere acts of trespass covering necessarily but a very short portion of the winter, and the possession must be taken to have been vacant

for the remainder of it; the right of the true owner would attach upon each occasion when the possession became thus vacant, and the operation of the Statute of Limitations would cease until actual possession was taken again in the spring by the plaintiff.

J. W. McCullough for the plaintiff.

Foy, Q.C., *MacGregor* and *F. E. Hodgins*, for the several defendants.

Div'l Court.] [March 6.

MCKAY *v.* BRUCE.

Easement—Grant of lands with right to use of springs on adjoining lands—Access to springs—Right to lay pipes to springs—Prescriptive rights—Enjoyment for twenty years—Interruption after twenty years—R.S.O., c. 111, ss. 35, 37—Unoccupied lands—Owners absent—License—Revocation of—Possession—Extinguishing easement—Registry laws—Notice—Mortgagor and mortgagee.

The plaintiff claimed title to two springs, C. and E., under conveyances in 1841 and 1843 of lands north of the springs. One conveyance granted the sole and perpetual right to spring C. together with the right to use the road from the southern boundary of the land granted to the springs; the other granted the sole and perpetual use of and right to the water of spring E., without indicating the manner in which the water was to be approached or its enjoyment had. The defendant was the owner of the land to the south upon which the springs were situated. The water had been carried from the springs by means of pipes through the defendant's land to the plaintiff's land from 1861 till 1882 or 1883, when the defendant tore up the pipes, insisting that the then owner of the plaintiff's land had no right to maintain them, and thereupon an arrangement was made under which the pipes were again put down with the addition of certain troughs for the convenience of the defendant's cattle.

Held, that under the conveyances the plaintiff had a right of access to spring C. by the road mentioned, and to spring E. by a convenient road to be laid out, but had no right to the easement of conveying the water by pipes through the defendant's land.

The result of the interruption in 1882 or 1883 and the arrangement then made was that since that time the plaintiff must be taken to have maintained the pipes, not as a matter of right, but by the license of the defendant; under ss. 35 and 37 of R.S.O., c. 111, the fact that twenty years had expired before the interruption was immaterial; and therefore the plaintiff had not acquired a prescriptive right to the easement.

The fact that for nearly the first half of the period from 1861 to 1881 or 1883 the land over which the easement was claimed was unoccupied and its owners out of the country constituted another objection to the acquisition of a prescriptive right under s. 135.

The license of the defendant under which the pipes were maintained since 1882 or 1883, being by parol, was determinable at any time by the defendant; and the defendant in subsequently taking up the pipes, which led to the bringing of this action, was acting within his strict legal right of revoking the license; and the plaintiff was not entitled to damages for their removal or for disturbing the ground in which they lay, whereby the water was rendered impure.

The possession by the defendant of the land through which access to the springs was to be had, for upwards of ten years, did not extinguish the plaintiff's right of access.

Mykel v. *Doyle*, 45 U.C.R. 65, followed.

Before the conveyances of 1841 and 1843, G., the then owner of all the lands now in question, conveyed them to M by a deed absolute in form, but really intended as a mortgage, and in 1857 in a redemption suit brought by persons who had acquired the equity of redemption from G. after the registration of the conveyances of 1841 and 1843, it was declared that this conveyance was a mortgage only, and in 1858 a conveyance was made by the representatives of G. pursuant to the decree reciting the payment of the mortgage moneys and conveying the lands to the plaintiffs in the redemption suit. The defendant claimed the land upon which the springs were situated under the grantees in the conveyance of 1858,

Held, that the defendant was affected under the Registry Acts, with notice that M. was a mortgagee only, and that those who redeemed him did so as owners of the equity; and the defendant could not set up the estate of the mortgagee, which, upon payment of the mortgage, was a bare legal estate, carrying with it no rights as against the beneficial owners of the land.

Aylesworth, Q C., for the plaintiff.

C. J. Holman for the defendant.

GALT, C.J.] [April 27.

UNION BANK *v.* NEVILLE.

Constitutional law—Assignments and preferences—R.S.O., c. 124, s. 9—Ultra vires—Bankruptcy and insolvency.

Section 9 of the Assignments and Preferences Act, R.S.O., c. 124, providing that an assignment for the general benefit of creditors under that Act shall take precedence of all judgments and of all executions not completely executed by payment, etc., gives to the assignment a much greater effect than the assignor could give; it is a provision relating to bankruptcy and insolvency, and therefore *ultra vires* of a Provincial Legislature, by s-s. 21 of s. 91 of the B.N.A. Act.

W. R. Meredith, Q.C., for the plaintiffs.

Beck for the assignee of the judgment debtors.

Middleton for the Sheriff of Carleton.

Robinson, Q.C., for the Minister of Justice for Canada.

Irving, Q.C., for the Attorney-General for Ontario.

Chancery Division.

BOYD, C.] [March 25.

ALDOUS *v.* HICKS.

Purchaser of equity of redemption—Covenant to pay mortgage—Action by mortgagee against purchaser.

Held, that though the purchaser of an equity of redemption, when he covenants to pay the existing mortgage upon the property, becomes primarily liable for the mortgage debt as between himself and the mortgagor, that does not create any privity of contract between him and the mortgagee; and no right of action arises to the mortgagee whereby he can recover the mortgage debt directly from the purchaser.

F. Mackelcan, Q.C., for the plaintiff.

J. T. Small for the defendant Hicks.

Practice.

MEREDITH, J.] [December 10.

CORNELL *v.* SMITH.

Parties—Action to establish will—Next of kin of testator—Adjournment of trial—Removal of case from Surrogate Court.

The plaintiffs propounded a will in a Surrogate Court under which they took the whole estate and were named as executors. The defendant, who was one of the next of kin, all having an equal interest if the will was invalid, contested its validity and the case was removed into the High Court. The other next of kin also disputed the will, but were not acting in concert with the defendant.

Upon an objection taken by the defendant at the trial,

Held, that the other next of kin should be made parties; and the trial was adjourned for that purpose, it appearing that they could conveniently be added.

Lount, Q.C., and *Heighington*, for the plaintiffs.

Osler, Q.C., and *H. S. Osler*, for the defendant.

MEREDITH, J.] [April 16.

WAGNER *v.* O'DONNELL.

Report—Appeal from—Summary proceedings to enforce mechanics' lien—53 Vict., c. 37, ss. 13, 35 (O.)—Rule 850—Court or Chambers.

In summary proceedings under the Act to simplify the procedure for enforcing mechanics' liens, 53 Vict., c. 37 (O.), the appeal to a Judge in Chambers under section 35 is confined to orders and certificates; the final report under section 13 is not included in the words "orders and certificates," and the appeal from such a report shall be to a Judge in Court under Rule 850.

H. C. Fowler for the plaintiffs.

McCabe for the defendants, Norton and McCabe.

G. C. Campbell for the mortgagee.

Flotsam and Jetsam.

JUDGE (to prospective juryman)—"What is your occupation?" P.J.—"Collector for the gas company." Judge.—"You are excused. It would be impossible for you to bring in a true bill."—*Irish Law Times.*

A TRAGEDY AVERTED.—An amusing incident occurred in the Lord Mayor's Court on April 15th, where the Recorder was sitting trying cases. A jury had heard a case, and, being unable to agree, retired to deliberate. After a while a note from the jury was handed to the Recorder, who, after perusing it, said: "I must prevent a tragedy; send for the jury." Upon returning into Court the jury were discharged without giving a verdict, as they were still unable to agree. It was afterwards stated that the note to the judge ran: "Ten of us agree; but the other two decline to agree while they have breath in their bodies."—*The Law Journal.*

PROBABLY the most unique trial on record in the Union Circuit Court took place recently. It was the suit of *James Roll* v. *Adelaide A. Hanson.* The proceedings were remarkably short, and were substantially as follows: Judge Van Syckel to sheriff—"Call a jury." About five minutes were devoted to swearing the jury. Mr. Robert G. Bell, plaintiff's attorney—"I will make no opening. Take the stand, Mr. Roll." Roll's testimony—"I loaned defendant $55 without any paper." Mr. Bell—"That is our case." Defendant's attorney—"No opening. Take the stand, Mrs. Hanson." Defendant's testimony—"Roll did not loan me $55." Defendant's attorney—"That is our case." Judge Van Syckel—"Will you sum up, gentlemen?" Mr. Bell—"I do not care to, your honor." Defendant's attorney—"I will leave it to the jury." Judge Van Syckel to jurors—"The Court will leave it to you, too, gentlemen. Swear an officer." This unique charge caused much merriment. The jury retired, and soon filed back again into the court-room with a verdict for the defendant.—*Elizabeth Journal* (*U.S.*).

Law Society of Upper Canada.

THE LAW SCHOOL, 1891.

LEGAL EDUCATION COMMITTEE.

CHARLES MOSS, Q.C., *Chairman.*

C. ROBINSON, Q.C. Z. A. LASH, Q.C.

JOHN HOSKIN, Q.C. J. H. FERGUSON, Q.C

F. MACKELCAN, Q.C. N. KINGSMILL, Q.C.

W. R. MEREDITH, Q.C.

This notice is designed to afford necessary information to Students-at-Law and Articled Clerks, and those intending to become such, in regard to their course of study and examinations. They are, however, also recommended to read carefully in connection herewith the Rules of the Law Society which came into force June 25th, 1889, and September 21st, 1889, respectively, copies of which may be obtained from the Secretary of the Society, or from the Principal of the Law School.

Those Students-at-Law and Articled Clerks, who, under the Rules, are required to attend the Law School during all the three terms of the School Course, will pass all their examinations in the School, and are governed by the School Curriculum only. Those who are entirely exempt from attendance in the School will pass all their examinations under the existing Curriculum of The Law Society Examinations as heretofore. Those who are required to attend the School during one term or two terms only will pass the School Examination for such term or terms, and their other Examination or Examinations at the usual Law Society Examinations under the existing Curriculum.

Provision will be made for Law Society Examinations under the existing Curriculum as formerly for those students and clerks who are wholly or partially exempt from attendance in the Law School.

Each Curriculum is therefore published herein accompanied by those directions which appear to be most necessary for the guidance of the student.

Curriculum of the Law School, Osgoode Hall, Toronto.

Principal, W. A. Reeve, Q.C.

Lecturers: E. D. Armour, Q.C.
A. H. Marsh, B.A., LL.B., Q.C.
R. E. Kingsford, M.A., LL.B.
P. H. Drayton.

The School is established by the Law Society of Upper Canada, under the provisions of rules passed by the Society with the assent of the Visitors.

Its purpose is to promote legal education by affording instruction in law and legal subjects to all Students entering the Law Society.

The course in the School is a three years course. The term commences on the fourth Monday in September and closes on the first Monday in May; with a vacation commencing on the Saturday before Christmas and ending on the Saturday after New Year's Day.

Students before entering the School must have been admitted upon the books of the Law Society as Students-at-Law or Articled Clerks. The steps required to procure such admission are provided for by the rules of the Society, numbers 126 to 141 inclusive.

The School term, if duly attended by a Student-at-Law or Articled Clerk is allowed as part of the term of attendance in a Barrister's chambers or service under articles.

The Law School examinations at the close of the School term, which include the work of the first and second years of the School course respectively, constitute the First and Second Intermediate Examinations respectively, which by the rules of the Law Society, each student and articled clerk is required to pass during his course; and the School examination which includes the work of the third year of the School course, constitutes the examination for Call to the Bar, and admission as a Solicitor.

Honors, Scholarships, and Medals are awarded in connection with these examinations. Three Scholarships, one of $100, one of $60, and one of $40, are offered for competition in connection with each of the first and second year's examinations, and one gold medal, one silver medal, and one bronze medal in connection with the third year's examination, as provided by rules 196 to 205, both inclusive.

The following Students-at-Law and Articled Clerks are exempt from attendance at the School.

1. All Students-at-Law and Articled Clerks attending in a Barrister's chambers or serving under articles elsewhere than in Toronto, and who were admitted prior to Hilary Term, 1889.

2. All graduates who on the 25th day of June, 1889, had entered upon the *second* year of their course as Students-at-Law or Articled Clerks.

3. All non-graduates who at that date had entered upon the *fourth* year of their course as Students-at-Law or Articled Clerks.

In regard to all other Students-at-Law and Articled Clerks, attendance at the School for one or more terms is compulsory as provided by the Rules numbers 155 to 166 inclusive.

Any Student-at-Law or Articled Clerk may attend any term in the School upon payment of the prescribed fees.

Students and clerks who are exempt, either in whole or in part, from attendance at The Law School, may elect to attend the School, and to pass the School examinations, in lieu of those under the existing Law Society Curriculum. Such election shall be in writing, and, after making it, the Student or Clerk will be bound to attend the lectures, and pass the School examination as if originally required by the rules to do so.

A Student or Clerk who is required to attend the School during one term only, will attend during that term which ends in the last year of his period of attendance in a Barrister's Chambers or Service under Articles, and will be entitled to present himself for his final examination at the close of such term in May, although his period of attendance in Chambers or Service under Articles may not have expired. In like manner those who are required to attend during two terms, or three terms, will attend during those terms which end in the last two, or the last three years respectively of their period of attendance, or Service, as the case may be.

Every Student-at-Law and Articled Clerk before being allowed to attend the School, must present to the Principal a certificate of the Secretary of the Law Society shewing that he has been duly admitted upon the books of the Society, and that he has paid the prescribed fee for the term.

The Course during each term embraces lectures, recitations, discussions, and other oral

methods of instruction, and the holding of moot courts under the supervision of the Principal and Lecturers.

During his attendance in the School, the Student is recommended and encouraged to devote the time not occupied in attendance upon lectures, recitations, discussions or moot courts, in the reading and study of the books and subjects prescribed for or dealt with in the course upon which he is in attendance. As far as practicable, Students will be provided with room and the use of books for this purpose.

The subjects and text-books for lectures and examinations are those set forth in the following Curriculum :

FIRST YEAR.

Contracts.

Smith on Contracts.
Anson on Contracts.

Real Property.

Williams on Real Property, Leith's edition.

Common Law.

Broom's Common Law.
Kerr's Student's Blackstone, books 1 and 3.

Equity.

Snell's Principles of Equity.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

SECOND YEAR.

Criminal Law.

Kerr's Student's Blackstone, Book 4.
Harris's Principles of Criminal Law.

Real Property.

Kerr's Student's Blackstone, Book 2.
Leith & Smith's Blackstone.
Deane's Principles of Conveyancing.

Personal Property.

Williams on Personal Property.

Contracts and Torts.

Leake on Contracts.
Bigelow on Torts—English Edition.

Equity.

H. A. Smith's Principles of Equity.

Evidence.

Powell on Evidence.

Canadian Constitutional History and Law.

Bourinot's Manual of the Constitutional History of Canada. O'Sullivan's Government in Canada.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to the above subjects as shall be prescribed by the Principal.

THIRD YEAR.

Contracts.

Leake on Contracts.

Real Property.

Dart on Vendors and Purchasers.
Hawkins on Wills.
Armour on Titles.

Criminal Law.

Harris's Principles of Criminal Law.
Criminal Statutes of Canada.

Equity.

Lewin on Trusts.

Torts.

Pollock on Torts.
Smith on Negligence, 2nd edition

Evidence.

Best on Evidence.

Commercial Law.

Benjamin on Sales.
Smith's Mercantile Law.
Chalmers on Bills.

Private International Law.

Westlake's Private International Law.

Construction and Operation of Statutes.

Hardcastle's Construction and Effect of Statutory Law.

Canadian Constitutional Law.

British North America Act and cases thereunder.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

During the School term of 1890-91, the hours of lectures will be 9 a.m., 3.30 p.m., and 4.30 p.m., each lecture occupying one hour, and two lectures being delivered at each of the above hours.

Friday of each week will be devoted exclusively to Moot Courts. Two of these Courts will be held every Friday at 3.30 p.m., one for the Second year Students, and the other for the Third year Students. The First year Students will be required to attend, and may be allowed to take part in one or other of these Moot Courts.

Printed programmes showing the dates and hours of all the lectures throughout the term, will be furnished to the Students at the commencement of the term.

GENERAL PROVISIONS.

The term lecture where used alone is intended to include discussions, recitations by, and oral examinations of, students from day to day, which exercises are designed to be prominent features of the mode of instruction.

The statutes prescribed will be included in and dealt with by the lectures on those subjects which they affect respectively.

The Moot Courts will be presided over by the Principal or the Lecturer whose series of lectures is in progress at the time in the year for which the Moot Court is held. The case to be argued will be stated by the Principal or Lecturer who is to preside, and shall be upon the subject of his lectures then in progress, and two students on each side of the case will be appointed by him to argue it, of which notice will be given at least one week before the argument. The decision of the Chairman will be pronounced at the next Moot Court, if not given at the close of the argument.

At each lecture and Moot Court the roll will be called and the attendance of students noted, of which a record will be faithfully kept.

At the close of each term the Principal will certify to the Legal Education Committee the names of those students who appear by the record to have duly attended the lectures of that term. No student will be certified as having duly attended the lectures unless he has attended at least five-sixths of the aggregate number of lectures, and at least four-fifths of the number of lectures of each series during the term, and pertaining to his year. If any student who has failed to attend the required number of lectures satisfies the Principal that such failure has been due to illness or other good cause, the Principal will make a special report upon the matter to the Legal Education Committee. For the purpose of this provision the word "lectures" shall be taken to include Moot Courts.

Examinations will be held immediately after the close of the term upon the subjects and text books embraced in the Curriculum for that term.

The percentage of marks which must be obtained in order to pass any of such examinations is 55 per cent. of the aggregate number of marks obtainable, and 29 per cent. of the marks obtainable on each paper.

Examinations will also take place in the week commencing with the first Monday in September for students who were not entitled to present themselves for the earlier examination, or who having presented themselves thereat, failed in whole or in part.

Students whose attendance at lectures has been allowed as sufficient, and who have failed at the May examinations, may present themselves at the September examinations at their own option, either in all the subjects, or in those subjects only in which they failed to obtain 55 per cent. of the marks obtainable in such subjects. Students desiring to present themselves at the September examinations must give notice in writing to the Secretary of the Law Society, at least two weeks prior to the time fixed for such examinations, of their intention to present themselves, stating whether they intend to present themselves in all the subjects, or in those only in which they failed to obtain 55 per cent. of the marks obtainable, mentioning the names of such subjects.

Students are required to complete the course and pass the examination in the first term in which they are required to attend before being permitted to enter upon the course of the next term.

Upon passing all the examinations required of him in the School, a Student-at-Law or Articled Clerk having observed the requirements of the Society's Rules in other respects, becomes entitled to be called to the Bar or admitted to practise as a Solicitor without any further examination.

The fee for attendance for each Term of the Course is the sum of $10, payable in advance to the Secretary.

Further information can be obtained either personally or by mail from the Principal, whose office is at Osgoode Hall, Toronto, Ontario.

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THAT the Court of Appeal has seen its way to reverse the decision of Street, J., in *Duggan* v. *The London and Canadian Loan and Agency Co.*, 19 Ont. 272, is news which will have been received by investors in stocks with a sigh of relief. This mode of investment has been accompanied hitherto by a singular freedom from liability to stumble into legal pitfalls. It has the merit of ease, inexpensiveness, comparative safety, and expedition. But if it had become necessary to employ a solicitor to investigate the title to stock offered for sale in the market before a transaction could be carried through with safety, that would certainly have had a tendency to take away some of the advantages which have been heretofore considered to attend this class of investments. It is fortunate for investors that the Court of Appeal has been able to come to the conclusion it did; and should the case be carried farther, it is to be hoped its decision may be upheld. The English cases on which Street, J., founded himself have no doubt gone a long way in support of his conclusion; but it has often seemed to us that the equity doctrine of "notice" has been so applied in many cases, both in our own courts and in England, as to lead to anything but an equitable result. The true principle we believe to be this, that *prima facie* the *cestui que trust* should as a rule bear the loss of the misfeasance or malfeasance of his trustee, and that that burthen should not in the absence of positive fraud, or such gross negligence or wilful blindness as of itself is indicative of actual fraud, be thrown by any doctrine of constructive notice upon the shoulders of any third person. The departure from this principle has, we believe, been in many cases productive of great injustice.

THE Court of Appeal at its recent sittings reversed the decision of the Chancery Divisional Court in *Martin* v. *Magee*, 19 Ont. 705. The case had an important bearing on the construction of the Devolution of Estates Act. The facts of the case were somewhat singular. The plaintiff had purchased the land in question at an auction sale. The vendors were the executors of Catharine Sheppard, whose title appears to have been as follows: One H. C. Sheppard, who owned the land, had died subsequently to the Devolution of Estates Act, leaving a will devising the land to his mother, Catharine Sheppard. No conveyance had been made by the executors of H. C. Sheppard either to Catharine Sheppard or her executors; and Catharine Sheppard had died ten days after her son, leaving a will whereby she devised the land to her executors in trust for sale. The sale took place within a year of the death of H. C. Sheppard. The plaintiff objected that the defendants, the executors of Catharine, had no title in the absence of a deed

from the executors of H. C. Sheppard, and the action was brought to recover the deposit. Ferguson, J., before whom the action was tried, treated the objection as a mere "matter of conveyance," holding that the defendants had a right to call for a conveyance of the legal estate from the executors of H. C. Sheppard, and the Divisional Court seemed to have adopted the same view, Boyd, C., who delivered the judgment of the Court, saying, "The land by section 4 devolved upon and became vested in the executors of Sheppard as assets for the payment of his debts. These being paid, or there being no debts, the executors will hold the bare legal estate for the devisee of the land. In other words, subject to the payment of debts, the beneficial interest in the land passes to the devisee, and she can make title as the real owner." This view of the effect of the statute the Court of Appeal were not able to adopt, and the result of the judgment in appeal, as we understand it, is that a devisee under a will has a mere potential right to the land devised and has no saleable title to it until he has obtained a conveyance from the personal representative. How far this principle has been infringed upon by the recent amendment of the Devolution of Estates Act, we are not at present prepared to say.

The decision of the Court of Appeal in this case and of Falconbridge, J., *In re Wilson & The Toronto Incandescent Light Co.*, 20 Ont. 397, bid fair to settle the law on this subject, as we venture to think, in accordance with the principle on which the Act is based. Whether this desirable result has been in any way marred by the recent Act remains to be seen.

THERE is a doctrine prevalent, we believe, in the scientific world that there is a natural tendency in things to continually revert to their original type; the influence of climate, culture, want of culture, or over-culture, want of light or too much light, or a hundred other circumstances, may have the result of producing variations from the original type; but these peculiar circumstances being removed or ameliorated, the tendency is to return to the primal form. It is a curious thing that even in the laws of a people we find the same apparently instinctive tendency to revert to primitive forms of law. We are accustomed to look upon sundry amendments of recent date which have been made in the laws of people of the Anglo-Saxon race as being altogether novel and modern, whereas they are clearly reversions to a distinctively primitive condition of the law. To mention a few of such instances—there is, first of all, the abolition of the rule of primogeniture as conferring superior and exclusive rights of succession to the estate of a deceased parent, and in its place the admission of all the issue of a decedent to equal rights of succession to his estate. Here we have not really the introduction of a new method of succession, but a return to what was really the primitive method—and one which prevailed amongst the Anglo-Saxons until the necessities of feudal service rendered it necessary to depart from it in favor of one which, though less conformable to natural justice, had the merit of greater convenience in effectuating the requirements of the feudal system of tenure. The feudal incidents of the feudal tenure of land were practically abolished as long ago as

the reign of Charles II., and by degrees England and her colonies are slowly and surely reverting to the ante-feudal principles of succession, and not unnaturally so, for those principles rest on the dictates of natural justice. Another notable instance of reversion to the original type is the tendency which has of late manifested itself in English-speaking communities to assimilate the succession to lands with that of goods and chattels. Here, again, it is no new method which has been introduced by our Devolution of Estates Act, but the primitive and original method prevalent among our ancestors. In spite of objections by those lawyers opposed to any change in a system to which they themselves have been accustomed, this revolution has been carried out both in Australia and the English-speaking parts of Canada with the almost unanimous consent of the community. It is somewhat curious that in the United States there has as yet, we believe, been no similar movement.

There, however, we find there is a decided tendency in some quarters to admit women to a much more prominent share than for many years they have been permitted to enjoy in public affairs. This too, if we mistake not, is also a tendency to revert to a former and a more primitive rule. It is quite a mistake to suppose that the present almost total exclusion of women from public positions of dignity and trust was the original rule with our ancestors. Many notable instances may be found in Anglo-Saxon history of women holding positions of great public importance—whether in the Church, as in the case of Hilda the celebrated abbess of Whitby; or in the State, as in the case of many women of rank who were admitted to the councils of the sovereign, and even presided at courts of justice held within their territorial domains. Ideas of this kind are of slow growth, and the experiments which are being made in some of the United States in the way of admitting women to practise and administer the law will no doubt be watched with interest.

EVIDENCE UNDER SUMMARY CONVICTION ACT.

A judgment which will interest those of the profession who practice in Magistrates' courts was lately delivered by Mr. Justice Rose, in the Common Pleas Division, in the case of *Reg.* v. *Hart*, decided last February.

The question the learned judge had to consider was whether, on a prosecution under the by-law of a municipality creating certain offences and punishing delinquents by fine and in default of payment of the same with imprisonment, the defendant was a competent and compellable witness. It was urged, in support of the conviction in this case, that the offence charged, not being a crime, R.S.O., cap. 61, sec. 9, applied, making the defendant a competent and compellable witness. In reply, it was urged that the offence, being punishable by fine, and, in default, imprisonment, was a crime, and that therefore sec. 9, cap. 61, R.S.O., did not apply. The learned judge took the latter view, and holds that wherever an offence is created by any statute, and the party committing it is punishable by fine, and, in default, imprisonment, such person is not a competent witness on his own behalf, nor can he be compelled by the prosecution to give

evidence. Following this decision, it has been urged that parties charged with offences against the Ontario Liquor License Act cannot be witnesses, on their own behalf, or for the prosecution. This contention, in my mind, is not tenable; for the offence charged being a crime, the whole procedure and the evidence to be taken on the trial of such an offence come within the legislative powers of the Dominion Government, and by R.S.C., cap. 106, sec. 114, it is enacted that in any prosecution under that Act (Canada Temperance Act), or any Act mentioned in the 120th Section of said Act, the person opposing or defending, or the wife or husband of such person opposing or defending, shall be competent and compellable to give evidence.

On referring to sec. 120, we find that any Act in force in any Province, respecting the issue of licenses for the sale of fermented or spirituous liquors, will come under the provisions of sec. 114, and that therefore the defendant, under any prosecution for an offence against the license laws of Ontario, and the wife of such defendant, are competent and compellable witnesses. Sections 114 and 120 of cap. 106 were specially inserted for the purpose of enabling such persons to give evidence. The decision, therefore, in *Reg.* v. *Hart* will not prevent the accused or his wife from giving evidence any more than it will prevent the accused in a case of common assault from giving evidence on his own behalf, his rights in such a case being guarded by statutory enactment. I am not aware that the point has ever been raised whether the Ontario Legislature, in enacting in their Liquor License Acts that such and such facts, having been proved, shall be deemed *prima facie* evidence of an offence committed, have or have not exceeded their powers. The judgment above referred to would point to the conclusion that such enactments are *ultra vires* of the Local Legislature.

N. MURPHY.

COLLECTING AGENCIES.

In this day the regular way of collecting debts through the joint aid of a solicitor and the ordinary courts of justice has grown into disfavor, and appears too humdrum and slow for an age of 'phones and cables, lightning expresses and electric cars; and collecting agencies make a specialty of such work, with their defaulters' lists placarded on fences and walls, their large and strikingly conspicuous envelopes containing threatening duns, and their uniformed officials with hatbands marked "Collector," and "Collector of Doubtful Debts."

Therefore with that generosity and disinterestedness for which our liberal profession is so famous, we would give a few pointers to these unlicensed practitioners by reminding or informing them how in other parts of this mundane sphere other barbarians, in other days, have sought to make the dishonest honest and the poor to pay their debts.

On the other side of the globe, where, as the poet hath it, the immense Pacific smiles around ten thousand little isles, lady collectors are used. The *modus operandi* is as follows: Public opinion having decided that the debt is a fair one, a party of women go to the debtor's door and sit them down in silence outside his house (in this they differ from the American female book agent). The news

spreads, friends and sightseers collect; the men, we opine, in surprise at the idea of a number of women sitting dumb; the women, in sympathy with their fellows who are so tried. The crowd, by its presence, ofttimes induces the poor debtor to pay on the first day; if not, the female bailiffs reassemble on the second evening. The company of spectators again appears, anxious to see the end. If this second citation does not cause payment, on the third night sterner measures are adopted; the men, enraged that their wives should be thus compelled to neglect their household duties, come together, set fire to the obstinate debtor's house, seize his pig, smash his canoe, and destroy everything they can lay their hands upon; so the last state of that debtor is worse than the first (*Ten Years in Melanesia*, by Rev. A. Penny).

On this side of the Atlantic and the Pacific, in the days of Cortes and Pizarro, the Muyscas were a tribe of Indians residing in the northern part of South America. Even here default was sometimes made in payment; when that happened the creditor hied him to the owner of a young tiger, or other wild beast bred up as a collecting agent, and bargained with him for his services; the keeper then took the animal and tied it to the door of the recalcitrant debtor, and that unfortunate individual had then to maintain the quadruped and his keeper until the creditor was satisfied (*Helps' Spanish Conquest*, vol. iv., p. 394).

In the good old days in Ireland, according to the Senchus Mor, or The Great Book of the Ancient Law (a book of great antiquity, compiled in, or perhaps slightly before, the eleventh century, as Sir Henry Maine thinks, but said by some to be that very code which was prepared under the influence of Saint Patrick on the introduction of Christianity into Ireland), the chief way of collecting debts or obtaining one's rights against another was by distress. This is the way, we are told, that they did it before the hated Saxon landed upon the Green Isle to vex the natives with his laws: The plaintiff, or creditor, having first given the proper notice, proceeded—if the defendant, or debtor, was a person of chieftain rank—"to fast upon him." The fasting upon him consisted in going to his residence and waiting there for a certain time without food. If the creditor did not within that period receive satisfaction for his claim, or a pledge or security therefor, he forthwith—accompanied by a law agent, witnesses, and others—seized his distress (*Early History of Institutions*, p. 280). But what if there was nothing to distrain, and the debtor simply allowed the creditor to fast on till he starved? Then, according to Sir H. Maine, the debtor had to settle for his conduct in the next world. The Druids believed in the immortality and transmigration of the soul, and so may well have taught that penal consequences in another state of being would follow the creditor's death through the debtor's misconduct, and this doctrine the Christian priest was likely still further to accentuate. One readily sees that this Irish system must have been somewhat difficult to carry into practice if one had a large number of debtors to look after.

The old Brehon way of collecting is identical with a practice diffused over the whole of the East, and which the Hindoos call "sitting dharna." In Persia, when a man intends to enforce payment of a demand by fasting, he begins by sowing some barley at his debtor's door and sitting down in the midst of the

seed, and he means by this that he will stay where he places himself without food either until he is paid or until the barley seed germinates and sprouts and grows and ears and gives him bread to eat (*Early History of Institutions*, p. 297).

Dharna means detention or arrest. The semi-divine legislator of India, Manu, who wrote a lawbook in verse, somewhere between 1280 B.C. and 400 A.D.—the learned are not quite sure when—and Brihaspiti, who wrote a standard Braminical lawbook, named Vyavahara Maqukha, both refer to the practice. This was the way the plan was worked in the latter part of the last century: The Brahmin who adopted this expedient for the purpose of gaining a point which he could not accomplish in any other way proceeded to the door, or house, of the person against whom it was directed, or wherever he might most conveniently arrest him; he then sat down in dharna with poison or a poignard or some other instrument of suicide in his hand, and threatening to use it if his adversary should attempt to molest or pass him, he thus completely arrested him. In this situation the Brahmin fasted, and, by the rigor of the etiquette, the unfortunate object of his arrest had to fast also, and thus they both remained until the institutor of the dharna obtained satisfaction. In this (as he seldom made the attempt without the resolution to persevere) he seldom failed, for if the party thus arrested should suffer the Brahmin sitting in dharna to perish by hunger, the sin would forever lie upon his head. And we are told that if a Brahmin be slain, as many as are the pellets of dust which his blood would make in the burnt-up soil of India, so many are the periods of a thousand years which the slayer must pass in hell (*Manu*, xi. 208). The Indian Penal Code (sec. 508) has forbidden the Brahmins to practise this special mode of oppression any more, and now "sitting dharna" chiefly survives in British India in the exaggerated air of suffering worn by a creditor who comes to ask a debtor of higher rank for payment, and who is told to wait. But it is still common in the native states (*Early History, etc.*, 299—304).

When a Kaffir had a lawsuit or claim against a fellow, he and his friends went in force to the village of the defendant; on their arrival they sat down together in some conspicuous position and awaited quietly the result of their presence. This was the signal for mustering all the adult male residents that were forthcoming; these, accordingly, assembled and also sat down within conversing distance. After a long silence the argument began (*Compendium of Kaffir Laws*, Dugmore, p. 38).

Among the ancient Egyptians—according to that most reliable historian, Herodotus (II. 136)—the levers used for extracting money from debtors were their reverence for ancestors and respect for the sanctity of family tombs. No man was allowed to borrow money without giving in pledge the body of his father, or of his nearest relative, (Herodotus only says "his father," but Sir Gardner Wilkinson presumes to suppose that some fathers did not die conveniently for their mummies to stand security for their impecunious sons, and so he suggests "the relative" idea). If the debt was not paid at the proper time the mummy could be removed, and the debtor was then considered infamous; and as the creditor usually found it much less inconvenient to take possession of the family

tomb than to have the debtor's mummified father in his sitting-room, the debtor could not inter his children or any of his family in the ancestral vault until the debt was paid. If the debtor died without a settlement, the celebration over him of the accustomed funeral obsequies was denied, and he could not enjoy the rights of burial either in the tomb of his ancestors or in any other place of sepulture, according to Herodotus (II. 136), Diodorus (I. 92, 93), and Wilkinson (*Ancient Egyptians*, vol. ii., p. 51). Have we here the origin of post obits? We understand now why all the old mummies were so carefully kept in the land of the Pharaohs.

The mention of two Hindoo lawbooks above leads us to state that we in Canada cannot be too thankful that our Ontario courts are not in the least troubled with citations from the works of the early Redmen—if, indeed, those polysyllabically-named worthies left any works that could be so used. Think of the burdens under which the practitioners in India labor! We are told that "the Mitakshara, the Smriti Chandrika, the Madhaviya, and the Sarasvati Vilasi are the works of paramount authority in the territories dependent upon the government of Madras." Another writer speaks of the books of Kamalakara, Madhaya, and Narayana, as being frequently consulted and cited there; while a third gives high place to what he calls the embodiment of all law, the Manu-Vijaneswareyum. Thank heaven we need only quote the works of Byles and Smith, Coke and Dart, and people blessed with such like names.

R. V. R.

COMMENTS ON CURRENT ENGLISH DECISIONS.

The Law Reports for May comprise (1891) 1 Q.B., pp. 549-671; (1891) P., pp. 189-257; (1891) 1 Ch., pp. 573-723.

HUSBAND AND WIFE—SEPARATE ESTATE—DEATH OF WIFE—DEVOLUTION TO HUSBAND JURE MARITI—DEBTS OF WIFE.

On p. 235 *ante*, in our note to *Surman* v. *Wharton*, a correspondent has kindly drawn our attention to the fact that there is a mistake. The last sentence should read as follows: "Even where the wife leaves no children, the husband in Ontario is only entitled to one-half of the property as to which she dies intestate, and subject thereto, the other half devolves as if her husband had predeceased her—R.S.O., c. 108, s. 5; consequently in no case in Ontario would the husband appear to be entitled *jure mariti* as in England." We may observe that the collocation of the statutes on this subject in the Revised Statutes is somewhat inconvenient and liable to be misleading.

PRACTICE—LEAVE TO SERVE OUT OF JURISDICTION—OFFICER ON BOARD QUEEN'S SHIP.

Seagrove v. *Parks* (1891), 1 Q.B. 551, may be referred to, not so much on account of the point of practice which it decides, as for the fact of the Court (Cave and Charles, JJ.) recognizing the principle that so long as an officer is on board of one of Her Majesty's ships he is "within the jurisdiction" of the Court, wherever the ship may be. The application was for leave to serve a defendant out of the jurisdiction, the defendant being an officer on board a Queen's ship on the

Mediterranean station, but which at the time of the application was on the high seas; but it was shown that it would touch at one or other of the coaling ports of the Mediterranean, and ultimately put in at Malta, the chief port of the station. Under these circumstances, for the reason above indicated, the application was refused. In Ontario, leave to serve out of the jurisdiction is not necessary, but after it has been effected it must be allowed. See Ont. Rule 274.

PRACTICE—SERVICE OF WRIT—ACTION AGAINST FIRM CARRYING ON BUSINESS IN ENGLAND—ONE PARTNER DOMICILED ABROAD—SUMMARY JUDGMENT AGAINST FIRM—ENG. RULES 53, 115 (ONT. RULES 265, 739).

In *Lysaght* v. *Clark* (1891), 1 Q.B. 552, the practice on the subject of serving a partner on behalf of a firm again came under discussion. In this case two foreigners composed a firm which carried on business in England. One of the firm resided in England; the other was domiciled abroad. A writ against the firm was served on the partner resident in England, and an appearance was entered by him; but there being no defence to the action the plaintiff obtained a summary judgment against the firm under Eng. Rule 115 (Ont. Rule 739). The defendants applied to set aside the proceedings, but the motion was dismissed by Cave and Grantham, JJ., the Court refusing to further limit the application of Rule 53 (Ont. Rule 265), allowing service to be effected on one partner for a firm, to cases like the present, where the business of the firm is carried on, and one of the partners also resides, within the jurisdiction. *Russell* v. *Cambefort*, 23 Q.B.D. 526 (see *ante* vol. 26, p. 8), and *Western National Bank* v. *Percy* (1891), 1 Q.B.D. 304 (see *ante* p. 105), being limited in their application to cases where all the members of the firm reside abroad. In the latter class of cases neither a partner nor a manager can be served for the firm. As we have already remarked, the Rules on this branch of practice seem to need revision.

PRACTICE—DISCOVERY—PRODUCTION—DISCOVERY BEFORE DEFENCE—ENG. RULE 454—(ONT. RULE 508.)

Henderson v. *The Underwriting & Agency Association* (1891), 1 Q.B. 557, was an application by defendant for discovery before defence. The action was on a policy of insurance effected on title deeds during their transit by post from Cadiz to Alexandretta in Syria, against certain perils enumerated in the policy, including perils of transit and conveyance, and thieves. The deeds were lost in transit. The defendants claimed to be entitled to discovery from the plaintiff and all persons interested in the proceedings and in the insurance, the subject matter of the action, but the Court (Cave and Jeune, JJ.) were of opinion that the defendants were only entitled to discovery in the ordinary form as to documents under Eng. Rule 454 (Ont. Rule 508).

ASSIGNMENT, VALIDITY OF—PUBLIC POLICY—SALARY OF CHAPLAIN TO WORKHOUSE—PUBLIC OFFICER.

In re Mirams (1891), 1 Q.B. 594, the short point decided by Cave, J., is that an assignment of salary made by a chaplain of a workhouse who is paid out of the rates is not invalid as against public policy; that such an officer is not a public officer within the meaning of the decisions. That to make an officer public it is necessary that the officer's salary be paid out of national, and not, as in the present case, out of municipal funds; and the officer must be public in the

strict sense of that term, and that a clergyman having the cure of souls is, as such, in no case "a public officer." "It is not enough that the due discharge of the duties of the office should be for the public benefit in a secondary or remote sense."

LANDLORD AND TENANT—LEASE—BREACH OF COVENANT FOR PAYMENT OF RENT—PROVISO FOR RE-ENTRY, CONSTRUCTION OF.

In *Shepherd* v. *Berger* (1891), 1 Q.B. 597, the action was brought by a lessor to recover possession of the demised premises under a proviso for re-entry contained in the lease, to the effect that "if and whenever" any one quarter's rent should be in arrear twenty-one days, and no sufficient distress could be levied, the lessor should be entitled to re-enter. Three quarters' rent was in arrear on 25th March, 1890; on the 25th April, 1890, the lessor distrained, and after the sale of the distress there remained due more than a quarter's rent. On the 25th May the writ issued. The Court of Appeal (Lord Esher, M.R., and Bowen and Fry, L.JJ.), overruling Day and Laurance, JJ., were of opinion that the plaintiff was entitled to succeed by virtue of the words "if and whenever," which Bowen, L.J., considered were tantamount to "if and as often as," and that whenever the two conditions co-existed, viz., a quarter's rent in arrear for twenty-one days, and no sufficient distress, the plaintiff's right of re-entry arose.

SHIP—BILL OF LADING—SHIP-OWNER'S LIABILITY—DEVIATION—"NECESSITY."

Phelps v. *Hill* (1891), 1 Q.B. 605, was an action for non-delivery of goods pursuant to bill of lading of goods shipped in the defendant's vessel. The vessel had started on her voyage, but being overtaken by bad weather was damaged, and had to put back for repairs. She was taken to Bristol, and on her way there was run into by another vessel and sunk. The plaintiffs contended that the deviation rendered necessary for the purpose of repairs was only so far as the nearest port where such repairs could have been properly effected and the cargo properly dealt with, which was either Queenstown or Swansea, either of which places was nearer than Bristol. But the Court of Appeal (Lindley, Lopes and Kay, L.JJ.) were of opinion that where the master, in *bonâ fide* exercise of his judgment, for the benefit of both the ship-owner and the owner of the cargo, chooses a port in preference to a nearer one, the court or jury ought not on light grounds to come to the conclusion that the deviation was unauthorized. The action therefore failed, there being circumstances shown warranting the taking of the ship to Bristol rather than to either of the other ports named.

SHIP—BILL OF LADING—EXCEPTION OF "PIRATES, ROBBERS, OR THIEVES, OF WHATEVER KIND, WHETHER ON BOARD OR NOT, OR BY LAND OR SEA"—THEFT BY PERSONS IN SERVICE OF SHIP.

Steinman v. *Angier Line* (1891), 1 Q.B. 619, was another action for non-delivery of goods, pursuant to a bill of lading, which contained an exception clause whereby the defendants were not to be liable for losses caused (*inter alia*) "pirates, robbers, or thieves, of whatever kind, whether on board or not, or by land or sea, rain, spray, barratry of the master or mariners," etc. The judge at the trial found that the goods in question were stolen, after being shipped, by some or one of the stevedores. The stevedore was, by the terms of the charter-party,

appointed by the charterers, but was paid by and in the service of the ship, and the learned judge (A. L. Smith, J.) was of opinion that a theft by persons in the service of the ship was not within the exception, and gave judgment for the value of the goods in favor of the plaintiffs; and the Court of Appeal (Lord Esher, M.R., and Bowen and Fry, L.JJ.) affirmed his decision, differing from the conclusion of the Supreme Court of New York in *American Insurance Co. of N.Y.* v. *Bryan*, 1 Hill 25, where, under a similar exception, thefts by the crew or by whatever person were held to be covered.

SHIP—CHARTER PARTY—CHARTERER'S LIABILITY TO CEASE ON CARGO BEING LOADED—LIEN FOR DEMURRAGE—DETENTION AT PORT OF LOADING.

Clinck v. *Radford* (1891), 1 Q.B. 625, is another shipping case. The action was by a shipowner against charterers to recover damages for detention at the port of loading. By the charter-party the ship was chartered for a voyage from Newcastle to New South Wales, where she was to load "in the usual and customary manner, a full and complete cargo of coals," to San Francisco, and there to deliver the same, "the cargo to be unloaded at the average rate of not less than 100 tons per working day, . . . or charterers to pay demurrage at the rate of 4d. per ton register per diem, except in case of unavoidable accident . . . the charterer's liability under this charter-party to cease on the cargo being loaded, the owner having a lien on the cargo for the freight and demurrage." The defendants detained the ship in loading sixteen days beyond what was usual and customary. The defendants contended that their liability for detention at the port of loading ceased under the charter-party upon the ship being loaded. Pollock, B., who tried the action, held that the cesser clause did not apply, and on appeal the Court of Appeal (Lord Esher, M.R., Bowen and Fry, L.JJ.) sustained him. The *rationale* of the decision may be gathered from a sentence of the judgment of Fry, L.J.: "The rule that we are *prima facie* to apply to the construction of a cesser clause followed by a lien appears to me to be well ascertained. That rule seems a most rational one, and it is simply this, that the two are to be read, if possible, as co-extensive." In the present case the clause giving the lien only applied to demurrage at the port of discharge and did not cover any claim for damages for detention at the port of loading, hence the cesser of liability did not extend to the latter claim.

SOLICITOR—UNQUALIFIED PERSON ACTING AS SOLICITOR.

In re Louis (1891), 1 Q.B. 649, Mathew, J., decided that a process server does not by settling affidavits of service to be made by persons in his employ act as a solicitor.

PRACTICE—COSTS—SPECIAL STATUTE AS TO COSTS—RULES AS TO COSTS DO NOT OVERRIDE STATUTES.

In *Reeve* v. *Gibson* (1891), 1 Q.B. 652, the action was to recover penalties for an infringement of a copyright, which by statute were fixed at 40s. for each infringement and double costs of suit. By 5 & 6 Vict., c. 97, s. 2, all enactments as to double costs were repealed, and instead the parties entitled to such double costs were to receive full and reasonable indemnity as to all costs, charges

and expenses, to be taxed. The plaintiff only recovered £8, whereupon the taxing officer held that the plaintiff had recovered less than £10 in an action for tort within the meaning of s. 116 of the C.C. Act, 1888, and therefore was not entitled to any costs; but the Divisional Court (Wills and V. Williams, J.) made an order for taxation, and the Court of Appeal (Lord Halsbury, L.C., and Lord Esher, M.R.) affirmed the order.

MARRIED WOMAN—SEPARATE PROPERTY—RESTRAINT AGAINST ANTICIPATION—CONTRACT OF MARRIED WOMAN, HOW FAR BINDING—MARRIED WOMAN'S PROPERTY ACT, 1882 (45 & 46 VICT., C. 75), S 1, S-SS. 2, 3, 4 (R.S.O., C. 132, S. 3, S-SS. 2, 3, 4).

In *Stogdon* v. *Lee* (1891), 1 Q.B. 661, that ever fruitful source of litigation, a married woman's contract, was in question. The action was brought to recover principal and interest due under a covenant made between the defendant and her late husband Philip Lee of the one part, and the plaintiff of the other part. At the time the covenant was made the defendant was entitled under a separation deed made between herself and a former husband, Charles L. Thorpe, ot the arrears of a certain annuity covenanted by him to be paid to trustees during their joint lives "for her separate use without power of anticipation," and she was also entitled to a legacy of £5,000 under Thorpe's will. Thorpe died in 1877, and the defendant married in Lee in 1880. By the instrument in which the covenant in question was contained the defendant and her husband charged the arrears of annuity and also the legacy in favor of the plaintiff. Day, J., at the trial awarded judgment in favor of the plaintiff, but the Court of Appeal (Lord Esher, M.R., Bowen and Fry, L.JJ.) unanimously reversed him, on the ground that the defendant at the time of the contract had no "separate estate," *Palliser* v. *Gurney*, 19 Q.B.D. 519 (see *ante* vol. 23, p. 408) being approved and followed. We meekly confess that the more we read the judicial expositions of the Married Woman's Property Act, the less we understand it. Under our own Act, which is not essentially different from the English Act, we thought, until this decision, that it was reasonably clear that when a woman married, all the property she owned at the time of her marriage which was not included in any settlement became upon her marriage, by the operation of the Married Woman's Property Act, her "separate property," and that being the case we should have thought that the arrears of annuity and the $5,000 legacy were therefore both, on the defendant's marriage with Lee, thereby, by virtue of the statute, made her "separate property" by a sort of statutory settlement. But according to this decision it would seem that, in order to render a married woman's contract binding, it is not only necessary that she should have separate property, but it must be separate property by virtue of some settlement and not merely by virtue of the statute. It is true the Court does not say so in terms, but that seems to us to be the effect of the decision; and if so, it is merely an instance of the judicial method of repealing statutes under the pretence of expounding them.

ADMIRALTY—COLLISION—DELAY IN INSTITUTING ACTION IN REM—MARITIME LIEN—STATUTE OF LIMITATIONS—INTEREST ON DAMAGES.

The *Kong Magnus* (1891), P. 223, was an action *in rem* in the Admiralty Court against a foreign vessel to enforce a claim of lien for damages for a collision.

The collision took place in April, 1878, and the action was not instituted until January 8th, 1889. The defendants set up by their defence that since the collision there had been important changes of interest in the ownership of the vessel; that it had been frequently at ports within the jurisdiction since the collision; and that by reason of the plaintiff's laches in bringing the action the defendants were not now in a position to produce proper evidence to establish their defence; and they claimed that it was unjust and inequitable that the plaintiffs should be allowed to continue the action, and that the plaintiff's claim was barred by their delay in prosecuting it. Sir James Hannen, P., held that there was no Statute of Limitations applicable, and that no period of limitation had been laid down by judicial decision, and that the principle the Court was guided by in such cases was to look to the particular circumstances of each case and see whether it would be inequitable, taking the lapse of time, the loss of witnesses and evidence, and the change of property, etc., into account, to entertain a suit of the kind or not. He therefore allowed the action to proceed; subsequently by consent the action was stayed on the terms of the defendants paying to the plaintiffs one-half the damages sustained, and a reference was directed to ascertain the amount. The registrar fixed the amount at £1504 12s. 9d., with interest at 4 per cent., from the 1st May, 1878, until paid. The defendants then appealed against the allowance of interest, but Sir Charles Butt, P., upheld the registrar's finding on that point, holding that according to the rule in admiralty cases the damages for a collision bore interest from the date of the collision until paid.

PRODUCTION OF DOCUMENTS—DOCUMENTS IN POSSESSION OF SOLICITOR.

O'Shea v. *Wood* (1891), P. 237, was an action to propound a will. The defendants applied to compel the plaintiff to produce documents in the possession of her solicitor, who had also been solicitor for the testatrix, and which documents were private books, etc., of the solicitor, containing entries and memoranda relating to the testatrix and her affairs. The application was refused by Jeune, J., as also an application to permit the administrator *ad litem*, to inspect and take copies of them for the defendants.

PROBATE—WILL—MISTAKE—NAME WRONGLY INSERTED AS LEGATEE—GRANT OF PROBATE OMITTING NAME OF LEGATEE.

In the goods of Boehm (1891), P. 247, an application for probate of a will with the omission of a name, which had been inserted by mistake, was made to Jeune, J. The testator had given directions for his will, and among other legacies he directed that two sums of £10,000 each should be set apart to be settled for his two daughters, Georgiana and Florence. By the mistake of the conveyancing counsel, Georgiana was named in the will as the legatee of both sums, and the name of Florence was omitted altogether—who was consequently left apparently unprovided for. An epitome of the will had been read to the testator, and it was clear he had signed it under a mistake; the engrossment had never been read over. Counsel for Georgiana consented to the proposed omission. Jeune, J., granted probate omitting the name of Georgiana as legatee of one sum of £10,000, leaving it for a court of construction to say how the will should be construed with that omission.

PROBATE—WILL—EXECUTOR ABSENT FROM THE COUNTRY—POWER OF ATTORNEY—GRANT OF PROBATE TO ATTORNEYS.

In the goods of Barker (1891), P. 251, an application for probate was made by the attorneys of an executor under the following circumstances. The principal had gone abroad in 1890, expecting to be absent two years, and he had left a power of attorney in favor of the applicants in general terms, enabling them to act for him about all his business and concerns of every kind as fully as he himself could do. The testator died in 1891 while the principal was still absent. Letters of administration with the will annexed was granted to the applicants.

PROBATE—TWO WILLS—PROPERTY IN ENGLAND AND CANADA.

In re Seaman (1891), P. 253, the testator had property in England and Canada, and had made two wills, one confined exclusively to the property in England, and the other to the property in Canada. Probate was granted of the English will on an affidavit being filed exhibiting a copy of the Canadian will; and an affidavit was also required showing that the movable chattels bequeathed by each will were actually at the time of the testator's death in the country to which the will which disposed of them referred.

Notes on Exchanges and Legal Scrap Book.

A JUROR AS A WITNESS.—The unusual incident of calling a juror from the jury-box to testify in the case on trial occurred yesterday in Supreme Court Circuit. The plaintiff, Emil Brusnitz, claimed $10,000 damages from the Netherlands Steam Navigation Co., for injuries he received in March, 1889, while a passenger in the second cabin of the steamer Leerdam. By a lurch of the vessel, Brusnitz was thrown heavily against an iron socket which projected above the deck, dislocating his shoulder. Edward A. Levy, one of the jurors, so impressed the counsel for the defence by the questions he put to witnesses, as to his knowledge of the subject matter, that he was called as an expert on strapping and shifting of cargoes. The Court allowed the juror to testify, against plaintiff's objection.—*Daily Record.*

STENOGRAPHERS' DIFFICULTIES.—Mr. Button, the stenographic reporter for the Parnell Commission, gives his opinion of forensic orators as follows: "The man who thinks clearly, and who expresses himself in respectable English, is not difficult to report. One of the most difficult of speakers to report is Sir Richard Webster. He is utterly careless as to the manner in which his sentences are constructed, and he talks very rapidly. Sir Richard is a trained athlete, and therefore a long-winded man; a sentence that would prostrate any other orator is to him mere child's play. Now, so far as a newspaper is concerned, the *ipsissima verba* of Sir Richard Webster's speeches do not matter much; his ideas can generally be put more neatly and effectively by the reporter himself. But the official shorthand-writer, be he Mr. Button or one of his three assistants, is bound to secure every word. He is forbidden either to touch up sentences or to im-

prove a man's style. To the official shorthand-writer, therefore, Sir Richard Webster has proved one of the fastest, as well as one of the most difficult speakers heard at the Parnell Commission Court. Sir Henry James is as voluble a speaker as the Attorney-General—he is possibly even more voluble—but then his elocution is remarkably clear and distinct."—*The Green Bag.*

SUPREME COURT OF THE UNITED STATES.—It is likely that there will be several changes in the personnel of the Supreme Court within the next two or three years. Justice Field is seventy-four years of age, while Justice Bradley, his junior in point of service, is three years his senior in age. Either could have retired on full salary for life. Two years hence the like right will be open to Justice Blatchford, who, at that time, will be ten years a member of the court, and seventy-two years of age. The probability therefore is, that the Supreme Court will contain more new faces within the next few years than it gained in any other equal period in the present decade. There seems to be something in service on that bench which is favorable to longevity. Few of its members have reached it until attaining middle life, yet the instances in which service has been extended to more than a quarter of a century are not rare. John Marshall, of Virginia, and Joseph Story, of Massachusetts, exceeded that limit nearly ten years, while the service of John McLean, of Ohio, and James M. Wayne, of Georgia, continued thirty-two years; that of Bushrod Washington, of Virginia, thirty-one years; of William Johnson, of South Carolina, thirty years; of Roger B. Taney, of Maryland, and of John Catron, of Tennessee, twenty-eight years; and of Samuel Nelson, of New York, twenty-seven years. Marshall heads the list in this respect, his service extending over thirty-four years.—*Central Law Journal.*

CAN A MURDERER ACQUIRE A TITLE BY HIS CRIME?—A decision which brings about a just result, but upon wrong grounds, is commonly mischievous as a precedent. A pertinent illustration of such mischief is to be found in *Shellenberger* v. *Ransom* (Nebraska, 1891), 47 N.W.R. 700, in which case *Riggs* v. *Palmer*, 115 N.Y. 506, was treated as a controlling authority. In the New York case a young man murdered his grandfather, in order to prevent a revocation of the latter's will, in which he, the grandson, was the principal beneficiary. Being convicted of the crime and sentenced to imprisonment for a term of years, he still claimed the property as devisee. The majority of the court, however, decided in favor of the testator's heirs, treating the will as revoked by the crime of the devisee. Two judges, dissenting, were of opinion that the will was not revoked, and that the grandson should keep the property in spite of his crime.

It seems possible to agree with the dissenting judges, that there was no revocation of the will, and also to agree with the majority of the court, that the grandson could not retain the property. By a familiar equitable principle, one who acquires a title by fraud or other unconscionable conduct is not allowed to keep it for himself, but is treated as a constructive trustee for the benefit of the victim of his fraud, or, if he be dead, for his representatives. Accordingly, full effect might have been given to the will, and yet the devisee, as a constructive

trustee, might have been compelled to surrender his ill-gotten title to the testator's heirs. In cases like *Riggs* v. *Palmer*, where the controversy is between the criminal and the representatives of his victim, the view here suggested and the view of the court may lead to a different mode of procedure; but they accomplish the same practical result. But directly opposite results are caused in cases where the controversy is between a *bonâ fide* purchaser from the criminal and the representatives of his victim. If no title passes from the deceased to the murderer, his purchaser gets none, however innocent. But if the murderer gets a title, although as a constructive trustee, an innocent purchaser from him will acquire a title free from the trust. This distinction was involved in *Shellenberger* v. *Ransom.*

A father murdered his daughter in order to inherit her property, and, four days later, sold the property to a third person. The court, reading into the Statute of Descent a disinheriting clause, as the majority of the Court in *Riggs* v. *Palmer* had read into the Statute of Wills a revocation clause, decided that the daughter's property did not descend to the father, because of his crime, and consequently declined to consider the question of the purchaser's good faith, although this should have been the cardinal point of the case. It is believed that the so-called fusion of law and equity is largely responsible for such decisions as those under discussion. The advantages of vesting a court with both legal and equitable powers are not to be denied. But when the doctrines of equity are no longer administered in a separate court, it is all the more important not to lose sight of the fundamental distinction between law and equity—a distinction as eternal as the difference between rights *in rem* and rights *in personam.*—*Harvard Law Review.*

UNANIMITY OF THE JURY.—Dissatisfaction with the working of the jury system seems to be increasing. It is no longer looked on with the admiration and respect that made it a most precious right in the eyes of our ancestors. One of their prominent grievances against King George was, as they said in the Declaration of Independence, "depriving us, in many cases, of the benefits of trial by jury." The Constitution guaranteed these benefits in criminal cases, and the amendment proposed at the first session of the first Congress secured the same privilege in civil cases. Though the civil provision has been held to apply only to the Federal courts, the right is established in all the State and lower courts, except in cases involving trifling amounts. From that day to this the spread-eagle orators of the country have seldom failed to boast of "trial by jury" while extolling the institutions of liberty.

Nevertheless, the incapacity of ordinary jurymen to deal intelligently with many of the intricate cases developed from the complexity of modern society has led to a natural substitute for the old system, in the shape of referees, auditors or arbitrators, who by general education or special training may be presumed to be qualified to unravel the particular case at issue. Judging by the increase in number of references, this method is growing in favor. Certainly it often saves both expense and delay, each of them important considerations in

modern litigation. Nevertheless, Judge Dwight Foster, not many years ago, wrote that he was "firmly persuaded that the verdicts of juries are, as a rule, more satisfactory to all concerned—parties, counsel and intelligent observers—than the awards of arbitrators or referees." Thus it will be seen that as to this remedy opinions differ, but at the same time that its partial success, as shown by its spread, proves the need of a remedy of some sort.

Another step in the same direction is the practice in many courts of dispensing with the jury and letting the judge decide questions of fact provided neither party to the suit calls for a jury. The chief objection made to this is that a judge should invariably be the decider of law and not of fact. Judge Foster said that he had been "less frequently, seriously and permanently dissatisfied with the verdicts of juries than with the decisions of judges on similar points." Judge Robert C. Pitman has made another point against compelling the Court to try questions of fact, in the matter of "the danger of thus impairing the confidence of litigants in its impartiality," for "all understand that the judge does not make but declares the law, but in deciding facts he must necessarily judge and weigh parties and witnesses." Yet Judge Pitman testifies that in Massachusetts this works satisfactorily.

The simplest and most logical way of increasing the justice of civil decisions, if we grant that justice can have any comparative degree, is possibly not the substitution of something else for the jury, but the removal of the requirement for unanimity of the jury. Very eminent authorities have long disapproved of this requirement in civil cases. Bentham styled it a system of "perjury enforced by torture," a description somewhat hyperbolical, but based on the facts. Hallam called it "that prosperous relic of barbarism." The experts appointed by Parliament in 1830 on the courts of common law said: "It seems absurd that the rights of a party in a question of a doubtful and complicated nature should depend on his being able to satisfy twelve persons that one particular state of facts is the true one." They proposed that after twelve hours, the opinion of nine of the jurors should prevail. Lord Campbell, many years after, introduced a bill to carry such a measure into effect, but it did not pass.

In a recent article in *Current Comment*, General Thomas Ewing has forcibly presented the arguments against unanimity, which he thinks is unsustained by either reason or experience, though he admits that in criminal cases it is a just and necessary safeguard of liberty. The presumption is that the accused is innocent, and to rebut it the proof of his guilt should exclude all reasonable doubt, not only in the minds of the majority, but of each and every one of the jurors. But, he says, there is no presumption in a civil action that the plaintiff is wrong. Where the verdict cannot, in the nature of the case, be a compromise, as in an action of ejectment or on a promissory note, disagreements of jurors result from the corruption or dullness or prejudice of a small minority. In almost all other cases the verdict is a compromise forced by a small minority and accepted by a large majority as only better than a mis-trial, a compromise founded on no testimony or principle, generally not representing the judgment of any single juryman.

The strongest argument for unanimity is that which insists upon the great value of giving to each juryman a veto power that insures for his opinion a fair consideration in the deliberations of the jury-room. In reply to this it is urged that the same end should be accomplished by providing only a unanimous verdict would be received for several hours after the jury had been sent out. As General Ewing recalls, when the present jury system was young, unanimity was obtained by fining the obstinate minority or by punishing the whole jury, as by driving them in open carts from one assize to another. More recently was devised the plan of imprisoning them, often without food or water, until cold, hunger, thirst or fatigue compelled the weak or ill or mean-spirited to commit moral perjury by assenting to a verdict against their consciences. "Why a unanimous verdict thus obtained was better than a majority verdict, no one has attempted to tell."

The opinion seems to grow that sooner or later we are coming to the majority verdict. Judge George C. Barrett has well pointed out that the demand for such a change will be greater as juries improve and as the difficulty in securing conscientious unanimity increases. It is hard enough for twelve strong men, in this enlightened age, to agree upon almost any debatable subject. Many argue, therefore, that if three-quarters or two-thirds, or even a bare majority, can come to a decision where a measure of damages is to be fixed, that is all that can reasonably be asked.—*Bradstreet's* (Amer.), taken from *Irish Law Times.*

COLONIAL JUDGES IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.—As promised at the conclusion of the article under the above heading in our last issue, we reproduce one on this subject by Mr. Stanley Leighton, M.P., which appears in *Imperial Federation* of May 1st:

"Many men have been talking for a long time about Imperial Federation. Discussion is good—nay, even indispensable—but already some are complaining that 'we are getting no forrader.' Our colonial system, which worked indifferently well years ago, still remains without material alteration. It cannot be denied that some slight improvements have been made. The Colonial Office is no longer a department of the War Office, but a self-centred office, presided over by a Cabinet Minister; but in other respects our method of carrying on the official relations between the Mother Country and Colonies has been little altered. The Mother Country waits for the Daughter States, the Daughter States wait for the Mother.

"*Festina lente* is an excellent motto; but there is another motto quite as relevant—'Not to advance is to recede.' It is the object of this article to indicate how a gentle advance towards more perfect Imperial Federation may be made, on judicial rather than on political lines. It seems that at the present moment an unambitious step forward may be safely taken without alarming the most cautious. It was nigh sixty years ago, when William the Fourth was king, that an Act of Parliament was passed to reconstruct the Court of Appellate Jurisdiction, not of the United Kingdom only, but of the whole Empire. The

preamble of that Act declares, amongst other things, 'Whereas from the decisions of various Courts of Judicature in the East Indies, and in the Plantations and Colonies and other dominions of His Majesty abroad, an appeal lies to His Majesty in Council; and whereas matters of appeal or petition to His Majesty in Council have usually been heard before a Committee of the Whole of His Majesty's Council, who have made a report to His Majesty, whereupon final judgment or determination hath been given of His Majesty; and whereas it is expedient to make certain provisions for the more effectual hearing and reporting on appeals to His Majesty in Council and on other matters,' etc., etc.; and the Act proceeds to provide that certain persons should form the Judicial Committee of the Privy Council, and amongst these that His Majesty may nominate 'two members, who shall have held the office of judge in the East Indies or any of His Majesty's dominions beyond the sea,' and that they are to receive an allowance out of the Consolidated Fund.

"Is it not an extraordinary fact that as regards our Colonies the wise provision of the last generation has been neglected? Indian judges have always sat upon the Judicial Committee, but room has never been found for Colonial judges.

"No one who has had any acquaintance with the powerful judicial minds which the Canadian, the South African, and the Australian groups of Colonies have produced, can say that there are not to be found amongst them men able to hold their own with the judicial commissaries of England, Scotland, and Ireland. Why have not some of them been invited to a seat in this great tribunal? Their presence would strengthen the Court; it would give confidence to the suitors; it would make obvious the link of Imperial connection, which is illustrated by the appeal to the Sovereign in Council. The sentimental interest which their presence would excite would be powerful. But more useful would be the practical results.

"There are many codes of law which prevail over the world-wide dominions of our sovereign lady. Mohammedan and Hindoo law in India, Chinese law in Hong Kong, Roman Dutch law in the Cape and in British Guiana, the Code Napoleon in the Mauritius, and the old French law in Canada. This list by no means exhausts the varieties of law and practice which are to be found throughout our Colonies. With the exception of two retired Indian judges, the Court which tries these cases on appeal is composed entirely of men selected from our Courts, unfamiliar with any other codes and constructions but our own. Comparatively few people know anything about this Court, which, nevertheless, is the most remarkable tribunal that the world has ever seen, with a jurisdiction the most widespread; a Court which is, indeed, the outward and visible sign of the 'Imperium Brittanicum' in its most positive form. We certainly do not magnify ourselves; we hardly make use of our most natural opportunities. When the new Law Courts were built, no one ever thought of providing a suitable chamber for the Supreme Court of Appellate Jurisdiction of the whole Empire! If you ask where this Court holds its sittings, no one will be able to tell you. You will be referred to Whitaker's Almanack. But even Whitaker is at a loss

here. To those whom it may concern, then, let it be known that if they turn from **Whitehall up Downing Street, and inquire at the first door on the right,** they will probably find a porter who, in response to their enquiries, will point with his hand to a narrow staircase. On the first floor they will observe a painted hand pointing "to the Court," and if they proceed further they will find themselves in an upper chamber. Half a dozen old gentlemen will be discovered sitting in ordinary morning dress round a table, and two or three barristers in wigs will be chatting to them. There is no accommodation for the public, but if they are lucky, and the attorneys' clerks are inclined to be civil, they will be able to sit with them on a bench and listen.

"If they cast their eye over the cause list, the names of the cases will convey the best idea of the vastness of the jurisdiction which is exercised here without display and without notice. Englishmen might be prouder than they are in the possession of such a court. They might make more of it for themselves and their Colonies. Some of the judicial reputations made in the Australias, or New Zealand, or in Africa, or in Canada, would add breadth and dignity, and possibly knowledge, to decisions pronounced by judges now exclusively English and Indian. There are many forms of federation, union, alliance, call it what we will, which may govern the future relations of the Great and the Greater Britain—commerce, defence, political representation, social fellowship, submission to one supreme court of appeal, all these are separate elements, distinct in themselves, which help to make up complete incorporation. At the present moment the line of easiest advance appears to be the judicial, and the manner of development is clearly by the Statute of the 3rd and 4th William IV., c. 41; that is to say, by the representation of the Colonial judicature on the Judicial Committee of Her Majesty's Most Excellent Privy Council."

JURIES AS THEY WERE AND ARE.—There are curious things to be told regarding juries, both as to their ancient and modern history. Valuable as the institution is, we have little or no certain knowledge of its origin. Not only have the Normans, the Saxons, the Gauls, the Romans, and even the Trojans, in turn had ascribed to them the honor of being the inventors of the system, and in turn been dispossessed of it; but some writers, acting like those foolish old testators who make a point of leaving their money to persons already having more than they know what to do with, declare that to Alfred the Great—a sovereign already lauded as the inventor of half the noblest institutions of England—the entire credit of the whole matter is due.

Whoever was the inventor, or what the period of the birth of the system, it is quite certain that very few traces of it are to be found anterior to the reign of Henry II. From the time of William to that of Henry II., the mode of administering justice was very simple. In civil cases a little hard swearing on one side or the other soon settled the matter; while as to criminals, by "fighting it out," a far more speedy result was, we doubt not, obtained, than is arrived at in our courts of justice at the present day. In Henry's reign, however, the simplicity

of all judicial proceedings was much broken in upon by the passing of a famous statute, usually called the Grand Assize. This statute ordained that in all cases in which the ownership of land, the rights of advowson, or the claims of vassalage came in question, four knights of the county should be summoned who joined with them twelve men, neighbors of those whose rights were in dispute, who should hear from them, upon their oaths, the truth of the matter in question. If these twelve could not agree in the tale they told the knights, the minority were dismissed, and others chosen in their stead; and this was repeated until twelve men were found whose tale was uniform: and then according to it judgment was given.

This singular mode of adjudicating appears to have ever since been held in great estimation; for although other species of trial by jury soon after sprung up, the Grand Assize was not set aside, but continued to be put in practice now and then down to the year 1838, when, for the last time, four knights, girt with their swords, and twelve recognitors, met in the Court of Common Pleas at Westminster, and were addressed by the Lord Chief-Justice Tindal as "gentlemen of the Grand Inquest and recognitors of the Grand Assize." The institution was shortly after abolished by Act of Parliament.

During the time of Edward I. the jury system was greatly improved, and to a certain extent resembled that of the present day. Knights of the shire were summoned by the sheriff—the origin of the present grand jury—twelve of whom had to be unanimous in *presenting* the guilt of a prisoner to the petty jury who were to try him. The petty jury, indeed, differed from a modern one in one important particular; for those composing it, after being sworn to act truly, heard no evidence from others, but each separately delivered a verdict founded on his own knowledge of the matter, and was thus a witness as well as a juryman. If the twelve could not agree, the minority were, as in the Grand Assize, turned aside, and others chosen in place of them, and this was done until the twelve presented a uniform verdict.

It may amuse the reader to know that the first civil matter tried by a jury, properly so called, of which any record has descended to us, was an action by the parson of Chipping-Norton against another parson for turning him out of his house on a Sunday.

It was not until the time of Henry VI. that witnesses were allowed to be called to inform the consciences of the jury respecting the matter in dispute, and not until so late as the reign of Anne that witnesses for a prisoner were heard upon oath.

The position of jurymen in "the good old times" must have been one of no ordinary severity. The fundamental rule was that the twelve men must agree in order to form a legal verdict. Why twelve were chosen in preference to any other number does not appear; and the only explanation, if it may be called one, is that of Sir Edward Coke, who says that twelve "is a number in which the law delighteth." In order then to get these twelve men to agree, all kinds of manœuvres were used. At first the practice of adding fresh jurymen, and turning away those who would not agree with the majority, technically called "affor-cing," was adopted; but this was attended with the expense of so much time and

trouble as to be almost useless. Then it became the custom to heavily fine those who would not agree with the majority, and this shortened matters a good deal; subsequently the verdict of the majority was taken, dissentients being fined or imprisoned; and at last the practice was adopted which has descended to the present day, of confining the sacred twelve alone, without meat drink, or fire, until the verdict was satisfactory.

In some of our old law books we meet with very amusing accounts of unfortunate jurymen being detected in attempting to evade this very stringent measure, and their peccadilloes seem always to have met with severe chastisement.

Thus, in Hilary term, 6 Henry VIII., we have a long account of a motion in the King's Bench to arrest a judgment obtained at the previous assizes, on the ground that the jurors had "improperly eaten and drank"; and, says the report, "upon examination it was found that the jury had after long consideration agreed, and returning to the court-house to give in their verdict, they saw Read, C.J., in in the way *running to see a fray*, and they follow him, and all ate bread and drank a horn of ale; and for this every one was fined forty shillings, but the plt had his judgment stand upon their verdict." The report does not inform us what fine was inflicted upon the learned judge for leaving the judgment-seat "to see a fray."

In another case of *Mounson* v. *West*, about the same period, the jury had been absent so long to consider their verdict that "the court did suspect, and gave commandment that a trusty man should search them, which was done, when some had figs in their pouches, and some had pippins, and some did confess that they had eaten of figs, and some that they had pippins, but they had not eaten thereof; whereupon after great and solemn advice and consideration, they who had eaten of the figs were fined £5 each, and they who had pippins, of which they had not eaten, forty shillings each."

Shortly afterward the Court of Queen's Bench declared that for "a juryman to have sweetmeats in his pocket was a high misdemeanor, punishable by fine or imprisonment, or both."

It was not, however, on the score of eating when he should have been fasting alone that the juryman's life was a hard one; if the judge considered that their verdict was against evidence, they might be punished with loss of all their personal property, might be imprisoned for a year, and were ever afterward considered infamous; while the amount of bullying to which they were exposed, both from the judge and from the counsel, would scarcely be credited at the present day. They were threatened, laughed at, and even taunted with being accessory to the prisoner's guilt, if they hesitated about giving the desired verdict. After enduring all this uncomplainingly for some hundred years, we find juries about the middle of the sixteenth century suddenly attempting to throw off the disgraceful shackles with which they had been for so long loaded. The first important case on record in which a jury boldly stood out against the judge is that of Sir Nicholas Throckmorton, tried at Guildhall in 1554.

Throckmorton was indicted for high treason, and, after a shamefully one-sided trial, the jury were almost *directed* to find him guilty. After a long absence from

the court they returned and deliberately pronounced a verdict of "Not Guilty." "Upon this," says the reporter, "the Lord Chief-Justice remonstrated with them in a threatening tone, saying, 'Remember yourselves better. Have you considered substantially the whole evidence as it was declared and recited? The matter doth touch the queen's highness and yourselves also; take good heed what you do." When he had finished, Whetston, the foreman, said: "My Lord, we have found him not guilty, agreeable to our consciences; and so say we all." But the jury suffered grievously for their honesty; the court committed all twelve to prison; four were discharged on humbly admitting they had done wrong; but of the remaining eight the Star Chamber adjudged that three of them should be fined £2,000 each, and the other five £200 each. So much for impartiality in the sixteenth century.

Throckmorton's jury had, however, broken the ice, and others were not slow in following their example; and for more than one hundred years after, battles were being continually fought between judge and jury with ever-varying results. In poor Mrs. Leslie's case the judge (Jeffreys) gained the day; on William Penn's trial the jury stood firm and triumphed; but the most glorious example of their success was shown upon the trial of the seven bishops in 1688, from which period we may date the decline of the arbitrary authority which the judges had before exercised.

While our modern jury system is a vast improvement over that which has preceded it, still it must be admitted that many glaring defects still remain in this noble institution. The composition of our juries is a matter which must cause a vast deal of reflection to the thinking man. Cases involving questions requiring the utmost intelligence for their consideration are often submitted to men possessing not even ordinary reasoning powers; and criminal matters, even involving as they frequently do the lives of fellow creatures, whose guilt or innocence can only be determined upon by disentangling with the utmost nicety the most conflicting evidence, are intrusted to men often of very limited endowments.

No one unused to the proceedings in our criminal courts would believe what strange exposures of the ignorance of our jurymen now and then take place. Prisoners have before now been declared guilty and recommended to mercy on the ground that the jury were not *quite sure that they did it.* A jury at Cardigan found a man guilty of arson *with £20 damages.* Another set of "clodhoppers," trying a man for murder, and being much confused by the judge telling them that upon the same indictment, if not satisfied as to the capital crime having been committed, they could find the prisoner guilty of manslaughter, just as they could on an indictment for child-murder find a woman guilty of concealing the birth—after deliberating for a long while, found the man *guilty of concealing the birth of the deceased.* A few years ago a poor woman was tried at an assize town in South Wales for the murder of her infant. The jury appeared to listen to the case with the utmost attention; but what was the general astonishment when, upon the conclusion of "summing up," the foreman addressed the judge with: "My Lord, I wish to say that I am the only man on the jury *understanding English.*" Of course nothing could be done in such a case; the prisoner had been given

into their charge, and they were bound to convict or acquit her. The foreman had therefore to explain the case to his brother-jurymen, and it is hardly necessary to say that the woman was acquitted.

A still more ridiculous instance of jury ignorance occurred some years ago on the Western Circuit. A man was indicted for burglary; the proofs were so clear against him, he having been caught in the act, that it was presumed that no defence would be attempted. His counsel, however, made a long and flaming speech, and protested that *he* believed the man to be innocent. The judge told the jury that it was unnecessary for him to sum up, as they could have but one opinion. After conferring a moment, the jury turned round and deliberately pronounced a verdict of "Not Guilty," to the amazement of every one in court. Of course the prisoner was, without further question on the case, discharged. On inquiring of a juryman the reasons which influenced them in giving so curious a verdict, the following reply was elicited: "Well, sir, we be most on us P—— men, and though the Lunnon judge said *he* thought the prisoner were guilty, *our recorder* (who was the man's counsel) said *he* thought he warn't, and we like to stick up for our recorder!"

Of course it is at all times easier to point out defects than to suggest remedies; but for the grievances we have mentioned, the cure seems simple and obvious. In all cases involving important questions or the life of a fellow creature, allow *special* juries, consisting of men who, from their education and position in society, are enabled to understand all the bearings of the case, and pronounce a verdict thereupon in a much more satisfactory manner than any *common* jury could do. —*Chambers' Journal.*

Reviews and Notices of Books.

The Dominion Law Index, embracing all the legislation of the Dominion Parliament, and such unrepealed Provincial enactments, and Imperial statutes, treaties and orders, as bear a special relation to Canada, down to and including the year 1890. By Harris H. Bligh, Q.C., editor of "The Consolidated Orders in Council of Canada," and Walter Todd, Private Bills Department, House of Commons. Toronto: Carswell & Co., Publishers, 1891.

This index, which appears to be very exhaustive, includes all the Acts of the Dominion Parliament, repealed and unrepealed, public and private; also the Acts of the several Legislatures of the Provinces which were in force at the time of Confederation.

Documents Illustrative of the Canadian Constitution. Edited with Notes and Appendixes, by William Houston, M.A., Librarian to the Ontario Legislature. Pp. xxii. 338. Toronto: Carswell & Co., 1891.

This collection of documents has at least the merit of novelty. Nothing very like it has ever come under our observation, the nearest approach to an analogue being Stubbs' "Select Charters and other Illustrations of English

Constitutional History." From the vast accumulation of documents fairly entitled to be called "constitutional" a selection had to be made on the basis of some general principle, and in our opinion the editor has acted wisely in confining his choice to those of international and Imperial origin. He has included among the appendixes a few Canadian documents, such as the statutes introducing English law and trial by jury into Upper Canada in 1792, but their presence there cannot mislead, and will be helpful to the student of the Canadian constitution. He will find himself usefully aided also by the general index to the whole volume, including the appendixes, and by the somewhat novel chronological table of events in Canadian and United States history. It should always be borne in mind by the Canadian student that the pre-revolutionary history of the American colonies belongs quite as much to Canada as it does to the United States, a fact which the editor emphasizes in his preface. The chronological table, it may be added, includes events so recent as the appointment of the present Governor-General of Canada in 1888, and the election of the present President of the United States in 1889.

Though Mr. Houston omits all documents belonging to the French *régime*, he has rendered good service to Canadian history by including the French as well as the English texts of the articles of capitulation of Quebec in 1759, and of Montreal in 1760. Both series of articles will well repay careful study in both languages. He has gone as nearly as possible to the original authorities in order to get trustworthy texts, and he has added to these, as to the other documents, much useful historical information in the shape of "Notes." For all practical purposes, these notes contain a history of Canada from the treaty of Utrecht to the present time, perhaps none the less interesting or instructive for being served up in detached fragments appended to the passages of the text they are intended to elucidate. It may be added that he has given with great minuteness, and, so far as we can see, with great accuracy, abundant references to the sources from which he obtained his own information. If writers and editors were more careful than they are to do this, much trouble to later investigators would be saved, and a far more valuable service would be rendered to the reading public. Nothing is more irritating to a student than to have a quotation thrust under his notice as impliedly authentic and authoritative without any hint as to the source from which it is taken.

One of the most interesting sections of the collection—for the documents naturally group themselves—is that relating to "Representative Institutions in the Maritime Provinces." Commencing with the Treaty of Utrecht in 1713, and ending with the Commission to Governor Carleton, in virtue of which the self-governing United Empire Loyalist colony of New Brunswick was constituted in 1784, these documents enable one to trace the development of parliamentary government outside of Imperial parliamentary enactments. The first parliaments, in what was Canada before Confederation, were created by the Constitutional Act of 1791, seven years subsequent to the constitution of New Brunswick, twenty-two years subsequent to the constitution of what is now Prince Edward Island, and thirty-three years subsequent to the inauguration

in Nova Scotia of a parliament which has enjoyed a continuous existence to the present day. The creation of these parliaments by means of Governors' Commissions places them at once in the same class with the colonial parliaments in what is now the United States, some of which were in existence, as Mr. Houston's chronological table shows, for a good deal more than a century before the Nova Scotian parliament was established. The correlation of these early events throws a flood of light on many things in Canadian history that would otherwise have been obscure.

Two documents in this collection are worthy of more attention than the cursory reader may think of giving them. Lord Mansfield's judgment in the Grenada case in 1774, and the Colonial Laws Validity Act of 1865. Each of these is in its own way a charter of colonial liberties, and when read in Mr. Houston's frame-work of historical annotation they afford a most interesting and instructive subject for comparative study. No better illustration of Lord Mansfield's marvellous historical erudition and legal acumen can be found in the law reports than this celebrated judgment, which ought to be read in connection with his equally celebrated parliamentary speech in 1766, in support of the right of the British Parliament to tax the Colonies. Both judgment and speech are models of conciseness, which jurists and statesmen of the present day would do well to imitate.

Mr. Houston has ventured to give, in an "Introduction," his own opinions as to the best method of teaching history, and some applications of his general principles to the treatment of these documents. He insists uncompromisingly on the necessity of substituting "seminary" treatment for the practice of lecturing, in order that the student may have a chance to form his own opinions instead of taking the lecturer's opinions ready-made. Perhaps it may be possible to press this contention too far, but it is safe to say that some "seminary" practice should be afforded to the student of history, and also to the student of law? Any system of training which does not develop the reasoning powers must be pronounced defective. The contention that this series of documents should be studied chronologically backward has much to commend it. If a student is to get over only part of the ground, then the most important document is the British North America Act; and it is quite true that the more modern documents do throw very helpful light on those that precede them. The views so energetically advocated in the introduction may not prevail *in toto*, but they can hardly fail to modify the practice of schools and colleges.

Correspondence.

To the Editor of THE CANADA LAW JOURNAL :

SIR,—On page 189 of *Clarke's Magistrates' Manual* is a form of an "accusation," under the "Speedy Trials Act," corresponding to an indictment in cases before the ordinary criminal court. Can you or any of your contributors tell me

the authority for this form? Was it originally prescribed by any legislative authority, or any rule framed by judges having the authority given them by enactment of the Legislature of Old Canada? In my county the record only has been used since the provisions of the "Speedy Trials Act" were applied to the Maritime Provinces, repeating the charge in the body of it in another shape in cases where an additional count would be necessary.

Nova Scotia. LEX.

[The form referred to is taken from that used in *Cornwall* v. *The Queen*, 33 Q.B. (Ont.) 106, as are also other similar forms.—ED. C. L. J.]

MARRIAGE LAWS IN NORTH-WEST.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—An important question which is likely to engage the attention of jurists in the near future is the legitimacy of so-called marriages solemnized after the Indian customs of our aborigines. With the natives it is a marriage in good faith. The intending husband buys the squaw from her father, generally by presenting him with a horse or two, to compensate him for the loss of the society of his daughter, as it were. The father grunts an assent, which all the inmates of the tepee endorse by treating the newly-made husband as a very near and dear relative. From the native standpoint, it is a real *bonâ fide* marriage. But the wily white man does not so regard it. He adopts this plan to get possession of the Indian woman with the consent of her relatives, but does not intend to make her his wife in good faith. He afterwards keeps her or drives her away from his habitation, as suits his interest or his caprice.

Now, can a white man, after contracting such a marriage, legally repudiate his so-called wife and legally contract another marriage? This is being attempted constantly in the North-West Territories. I see reported at least one case decided by an Ontario judge which pronounces the child of such a marriage legitimate, namely, Sara Jane Robb, daughter of the late Geo. Robb, of Kingston, Ont., who was judicially declared legitimate and thereby entitled to inherit some $20,000 left by her father.

If this is a sample of the interpretation put upon such marriages by our courts, our libidinous friends in the Territories have got caught in the trap which they had set for the poor, ignorant savage, whom they beguiled and, as they thought, degraded. Being remote from much legal intelligence, we Nor'westers are in the dark considerably as to this matter, and would be much obliged were one or more of your able contributors to elucidate this subject in the columns of THE JOURNAL for the benefit of non-professional as well as professional readers.

FIAT JUSTITIA.

North-West Territory.

DIARY FOR JUNE.

1. Mon.....First Parliament in Toronto, 1797.
2. Thur.....Lord Eldon born, 1751.
3. Fri.....Battle of Stony Creek, 1813.
4. Sat.....Easter Term ends.
5. Sun.....*2nd Sunday after Trinity.*
6. Mon.....County Ct. Sitgs. for Motions in York. Surrogate Ct. Sittings. First Parliament at Ottawa, 1866.
7. Wed.....County Ct. Sittings for trial, except in York.
8. Thur.....St. Barnabas. Lord Stanley Governor-General. 1888.
9. Sun.....*3rd Sunday after Trinity.*
10. Mon.....Civil Assizes at Toronto. Magna Charta signed, 1215.
16. Tues.....Battle of Quatre Bras, 1815.
18. Thur.....Battle of Waterloo, 1815.
19. Fri.....Battle of Blenheim, 1704.
20. Sat.....Accession of Queen Victoria, 1837.
21. Sun.....*4th Sunday after Trinity.* Longest day.
22. Mon.....Slavery declared contrary to the law of England, 1772.
24. Wed.....Midsummer day. St. John Baptist.
25. Thur.....Sir M. C. Cameron died, 1887.
28. Sun.....*5th Sunday after Trinity.* Coronation of Queen Victoria, 1838.
29. Mon.....St. Peter.
30. Tues.....Jesuits expelled from France, 1880.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

[May 12.

DUGGAN *v.* LONDON & CANADIAN LOAN & AGENCY COMPANY.

Shares— Pledge — Transfers "in trust" — Repledge by first pledgee—Redemption.

The plaintiff obtained from a loan company an advance on the security of certain shares in a joint stock company not numbered or capable of identification, which were transferred by him to the managers of the loan company "in trust." The managers were also brokers, and were as brokers carrying on speculations for the plaintiff, and he transferred to them as security for the payment of margins certain other shares in the same company, the transfer being in the same form "in trust." Subsequently the loan company were paid off by the brokers at the plaintiff's request, but the brokers continued to hold the first shares as well as the others as security. Upon all the shares the brokers then obtained advances from a bank, transferring them to the cashier "in trust," and from time to time changed the loan to other banks and financial institutions, each transfer being made to the manager "in trust." An allotment of new shares was taken up by the then holders at the request of plaintiff. After this the brokers, on the security of the old and new shares, obtained a loan from the defendants of a much larger amount than the amount due by the plaintiff to the brokers, the shares being transferred by the then holders to the defendants.

Held, reversing the judgment of STREET, J., 19 O.R. 272, that the defendants were entitled to hold the stock as security for the full amount advanced by them to the brokers, and that the form of transfer "in trust" to the holders who transferred to the defendants was not in itself sufficient to put the defendants on enquiry as to the brokers' title, but might fairly be interpreted as meaning that the various transferees were holding the shares "in trust" for the respective institutions.

E. Blake, Q.C., and *Oliver Howland*, for the appellants.

McCarthy, Q.C., and *J. K. Kerr*, Q.C., for the respondent.

IN RE LONG POINT COMPANY *v.* ANDERSON.
IN RE LONG POINT COMPANY *v.* DUNCAN.

Prohibition—Division Court—Error in law.

Prohibition will not lie to a Division Court merely because a judge has erred in his construction of a statute where the judge does not by this error in construction give himself jurisdiction he does not in law possess.

Judgment of the Queen's Bench Division, 19 O.R. 487, reversed.

McCarthy, Q.C., and *W. M. Douglas*, for the appellants.

C. E. Barber for the respondents.

REDMOND *v.* CANADIAN MUTUAL AID ASSOCIATION.

Insurance—Life insurance—Assessments—Forfeiture—Waiver.

Where a mutual insurance company have without objection received payment of assessments after the proper date for their payment, they are not thereby debarred from insisting on a subsequent occasion upon the strict observance of the conditions of the company as to payment when they give notice that they intend so to insist and there is no conduct on their part tending to mislead the insured.

Judgment of the Queen's Bench Division reversed.

Watson, Q.C., for the appellants.

F. A. Anglin for the respondent.

MARTIN *v.* MAGEE.

Vendor and Purchaser—Title—Devolution of Estates Act—R.S.O. (1887), c. 108.

Under the Devolution of Estates Act the legal estate in the deceased's land vests in his legal personal representative, and the beneficial owner—whether the debts of the deceased are paid or not—cannot make a good title without a conveyance from the legal personal representative.

Judgment of the Chancery Division, 19 O.R. 705, reversed.

E. D. Armour, Q.C., and *D. Macdonald*, for the appellant.

Hoyles, Q.C., and *J. Chisholm*, for the respondent.

EDMONDS *v.* HAMILTON PROVIDENT AND LOAN SOCIETY.

Mortgagor and Mortgagee—Interest—Insurance—Application of—R.S.O. (1887), c. 102, s. 4.

Under ordinary circumstances a mortgagee can claim interest only from the time the money is advanced.

Where insurance moneys are received by a mortgagee under a policy effected by the mortgagor pursuant to a covenant to insure contained in a mortgage made pursuant to the Short Forms Act, the mortgagee is not bound to apply the insurance moneys in payment of arrears, but may hold the insurance moneys in reserve as collateral security while any portion of the mortgage moneys is unpaid.

Judgment of the Queen's Bench Division, 19 O.R. 677, varied.

W. R. Meredith, Q.C., and *John Crerar*, Q.C., for the appellants.

Aylesworth, Q.C., and *P. C. Macnee*, for the respondents.

GRIFFITH *v.* CROCKER.

Debtor and Creditor—Accounts—Appropriation of payments.

Appropriation of payments is a question of intention, and where a creditor takes security for an existing indebtedness and thereafter continues his account with the debtor in the ordinary running form, charging him with goods sold and crediting him with moneys received, there is no irrebutable presumption that the payments are to be applied upon the original indebtedness.

Judgment of STREET, J., reversed.

J. H. Coyne for the appellant.

Gibbons, Q.C., for the respondent.

HIGH COURT OF JUSTICE.

Chancery Division.

BOYD, C.] [April 20.

LASBY *v.* CREWSON.

Will—Construction—Direction to divide estate into impossible fractions—Carrying out intention notwithstanding difficulty of particular words used.

A testator devised as follows: "When my youngest son is of the age of eighteen years, my estate . . . shall be divided among my children then living; that is to say, to each of my sons I leave two-thirds, and to each of my daughters one-third of all my estate and effects."

When the youngest son attained eighteen years there were twelve children living, seven daughters and five sons.

Held, that in order to carry out the clear intention, notwithstanding the apparent difficulty caused by the particular words, the above devise should be construed to mean that each son's portion should be double that of a daughter.

D. Guthrie, Q.C., and *J. Watt*, for the plaintiff.

McMurchy for P. R. Loscombe.

N. G. Bigelow for Williams & Williams.

D. Burke Simpson, *G. W. Field*, *T. P. Coffee* and *J. A. Mowat* for other parties.

FERGUSON, J.] [May 9.

RE WANSLEY AND BROWN.

Vendor and purchaser—Religious body—Dispersed congregation—Trust not ended—Trustees—Sale by—Sanction of county judge—R.S.O., c. 137, s. 14, s-ss. 1, 2, and 3—Corporate succession.

In an application under the Vendor and Purchaser Act, R.S.O., c. 112, in which the trustee of a congregation which had separated and ceased to exist was making title to lands belonging to the said congregation but useless for its original purpose,

Held, following *Attorney-General* v. *Jeffrey*, 10 Gr. 273, that the trust had not come to an end.

Held, also, that the sanction of sale and the approval of the deed by the County Judge, as provided for by R.S.O., c. 237, s. 14, s-s. 3, is sufficient in lieu of all that is required by s-ss. 1 and 2.

Held, also, that the Statute 9 Geo. 4, c. 2, s. 1, created in the trustees "the corporate attribute of succession," and so created them a corporation, and that under the deed in question they took an estate in fee simple and had power to sell.

Walter Read for the vendor.

Lash, Q.C., for the purchaser.

STREET, J.] [May 11.

HAGAR *v.* O'NEILL ET AL.

Mortgage—Illegal and immoral consideration—Purchase money of a house of ill-fame—Knowledge of—Participation in—Legal title—Payment of amount due.

In an action on a mortgage given in part payment of the purchase money of a house of ill-fame the defendants set up that the consideration was illegal and immoral.

Held, that in order to establish such a defence the defendants must show more than a knowledge of the plaintiff of the immoral trade carried on on the premises and a belief that it would be continued; they must show something done in furtherance of the immoral purpose or some consent to or participation in it.

Held, also, that even if the consideration was tainted with illegality, although the plaintiff could not recover it by action, she having obtained the legal estate by the mortgage as security for the purchase money was entitled to possession by virtue thereof, and the only way in which the defendants could retain possession was by payment of the balance of the purchase money and costs.

R. G. Smyth for the plaintiff.

John G. Holmes for the defendants.

Flotsam and Jetsam.

IN a town up north an ex-judge is cashier of a bank. One day recently he refused to cash a check offered by a stranger. "The check is all right," he said, "but the evidence you offer in identifying yourself as the person to whose order it is drawn is scarcely sufficient." "I have known you to hang a man on less evidence, judge," was the stranger's response. "Quite likely," replied the ex-judge, "but when it comes to letting go of cold cash we have to be careful." —*Central Law Times.*

Law Society of Upper Canada.

THE LAW SCHOOL, 1891.

LEGAL EDUCATION COMMITTEE.

CHARLES MOSS, Q.C., *Chairman.*

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W. R. MEREDITH, Q.C.

This notice is designed to afford necessary information to Students-at-Law and Articled Clerks, and those intending to become such, in regard to their course of study and examinations. They are, however, also recommended to read carefully in connection herewith the Rules of the Law Society which came into force June 25th, 1889, and September 21st, 1889, respectively, copies of which may be obtained from the Secretary of the Society, or from the Principal of the Law School.

Those Students-at-Law and Articled Clerks, who, under the Rules, are required to attend the Law School during all the three terms of the School Course, will pass all their examinations in the School, and are governed by the School Curriculum only. Those who are entirely exempt from attendance in the School will pass all their examinations under the existing Curriculum of The Law Society Examinations as heretofore. Those who are required to attend the School during one term or two terms only will pass the School Examination for such term or terms, and their other Examination or Examinations at the usual Law Society Examinations under the existing Curriculum.

Provision will be made for Law Society Examinations under the existing Curriculum as formerly for those students and clerks who are wholly or partially exempt from attendance in the Law School.

Each Curriculum is therefore published herein accompanied by those directions which appear to be most necessary for the guidance of the student.

CURRICULUM OF THE LAW SCHOOL, OSGOODE HALL, TORONTO.

Principal, W. A. REEVE, Q.C.

Lecturers: E. D. ARMOUR, Q.C.
A. H. MARSH, B.A., LL.B., Q.C.
R. E. KINGSFORD, M.A., LL.B.
P. H. DRAYTON.

The School is established by the Law Society of Upper Canada, under the provisions of rules passed by the Society with the assent of the Visitors.

Its purpose is to promote legal education by affording instruction in law and legal subjects to all Students entering the Law Society.

The course in the School is a three years course. The term commences on the fourth Monday in September and closes on the first Monday in May; with a vacation commencing on the Saturday before Christmas and ending on the Saturday after New Year's Day.

Students before entering the School must have been admitted upon the books of the Law Society as Students-at-Law or Articled Clerks. The steps required to procure such admission are provided for by the rules of the Society, numbers 126 to 141 inclusive.

The School term, if duly attended by a Student-at-Law or Articled Clerk is allowed as part of the term of attendance in a Barrister's chambers or service under articles.

The Law School examinations at the close of the School term, which include the work of the first and second years of the School course respectively, constitute the First and Second Intermediate Examinations respectively, which by the rules of the Law Society, each student and articled clerk is required to pass during his course; and the School examination which includes the work of the third year of the School course, constitutes the examination for Call to the Bar, and admission as a Solicitor.

Honors, Scholarships, and Medals are awarded in connection with these examinations. Three Scholarships, one of $100, one of $60, and one of $40, are offered for competition in connection with each of the first and second year's examinations, and one gold medal, one silver medal, and one bronze medal in connection with the third year's examination, as provided by rules 196 to 205, both inclusive.

The following Students-at-Law and Articled Clerks are exempt from attendance at the School.

1. All Students-at-Law and Articled Clerks attending in a Barrister's chambers or serving under articles elsewhere than in Toronto, and who were admitted prior to Hilary Term, 1889.

2. All graduates who on the 25th day of June, 1889, had entered upon the *second* year of their course as Students-at-Law or Articled Clerks.

3. All non-graduates who at that date had entered upon the *fourth* year of their course as Students-at-Law or Articled Clerks.

In regard to all other Students-at-Law and Articled Clerks, attendance at the School for one or more terms is compulsory as provided by the Rules numbers 155 to 166 inclusive.

Any Student-at-Law or Articled Clerk may attend any term in the School upon payment of the prescribed fees.

Students and clerks who are exempt, either in whole or in part, from attendance at The Law School, may elect to attend the School, and to pass the School examinations, in lieu of those under the existing Law Society Curriculum. Such election shall be in writing, and, after making it, the Student or Clerk will be bound to attend the lectures, and pass the School examination as if originally required by the rules to do so.

A Student or Clerk who is required to attend the School during one term only, will attend during that term which ends in the last year of his period of attendance in a Barrister's Chambers or Service under Articles, and will be entitled to present himself for his final examination at the close of such term in May, although his period of attendance in Chambers or Service under Articles may not have expired. In like manner those who are required to attend during two terms, or three terms, will attend during those terms which end in the last two, or the last three years respectively of their period of attendance, or Service, as the case may be.

Every Student-at-Law and Articled Clerk before being allowed to attend the School, must present to the Principal a certificate of the Secretary of the Law Society shewing that he has been duly admitted upon the books of the Society, and that he has paid the prescribed fee for the term.

The Course during each term embraces lectures, recitations, discussions, and other oral

methods of instruction, and the holding of moot courts under the supervision of the Principal and Lecturers.

During his attendance in the School, the Student is recommended and encouraged to devote the time not occupied in attendance upon lectures, recitations, discussions or moot courts, in the reading and study of the books and subjects prescribed for or dealt with in the course upon which he is in attendance. As far as practicable, Students will be provided with room and the use of books for this purpose.

The subjects and text-books for lectures and examinations are those set forth in the following Curriculum :

FIRST YEAR.

Contracts.

Smith on Contracts.
Anson on Contracts.

Real Property.

Williams on Real Property, Leith's edition.

Common Law.

Broom's Common Law.
Kerr's Student's Blackstone, books 1 and 3.

Equity.

Snell's Principles of Equity.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

SECOND YEAR.

Criminal Law.

Kerr's Student's Blackstone, Book 4.
Harris's Principles of Criminal Law.

Real Property.

Kerr's Student's Blackstone, Book 2.
Leith & Smith's Blackstone.
Deane's Principles of Conveyancing.

Personal Property.

Williams on Personal Property.

Contracts and Torts.

Leake on Contracts.
Bigelow on Torts—English Edition.

Equity.

H. A. Smith's Principles of Equity.

Evidence.

Powell on Evidence.

Canadian Constitutional History and Law.

Bourinot's Manual of the Constitutional History of Canada. O'Sullivan's Government in Canada.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to the above subjects as shall be prescribed by the Principal.

THIRD YEAR.

Contracts.

Leake on Contracts.

Real Property.

Dart on Vendors and Purchasers.
Hawkins on Wills.
Armour on Titles.

Criminal Law.

Harris's Principles of Criminal Law.
Criminal Statutes of Canada.

Equity.

Lewin on Trusts.

Torts.

Pollock on Torts.
Smith on Negligence, 2nd edition

Evidence.

Best on Evidence.

Commercial Law.

Benjamin on Sales.
Smith's Mercantile Law.
Chalmers on Bills.

Private International Law.

Westlake's Private International Law.

Construction and Operation of Statutes.

Hardcastle's Construction and Effect of Statutory Law.

Canadian Constitutional Law.

British North America Act and cases thereunder.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

During the School term of 1890-91, the hours of lectures will be 9 a.m., 3.30 p.m., and 4.30 p.m., each lecture occupying one hour, and two lectures being delivered at each of the above hours.

Friday of each week will be devoted exclusively to Moot Courts. Two of these Courts will be held every Friday at 3.30 p.m., one for the Second year Students, and the other for the Third year Students. The First year Students will be required to attend, and may be allowed to take part in one or other of these Moot Courts.

Printed programmes showing the dates and hours of all the lectures throughout the term, will be furnished to the Students at the commencement of the term.

GENERAL PROVISIONS.

The term lecture where used alone is intended to include discussions, recitations by, and oral examinations of, students from day to day, which exercises are designed to be prominent features of the mode of instruction.

The statutes prescribed will be included in and dealt with by the lectures on those subjects which they affect respectively.

The Moot Courts will be presided over by the Principal or the Lecturer whose series of lectures is in progress at the time in the year for which the Moot Court is held. The case to be argued will be stated by the Principal or Lecturer who is to preside, and shall be upon the subject of his lectures then in progress, and two students on each side of the case will be appointed by him to argue it, of which notice will be given at least one week before the argument. The decision of the Chairman will be pronounced at the next Moot Court, if not given at the close of the argument.

At each lecture and Moot Court the roll will be called and the attendance of students noted, of which a record will be faithfully kept.

At the close of each term the Principal will certify to the Legal Education Committee the names of those students who appear by the record to have duly attended the lectures of that term. No student will be certified as having duly attended the lectures unless he has attended at least five-sixths of the aggregate number of lectures, and at least four-fifths of the number of lectures of each series during the term, and pertaining to his year. If any student who has failed to attend the required number of lectures satisfies the Principal that such failure has been due to illness or other good cause, the Principal will make a special report upon the matter to the Legal Education Committee. For the purpose of this provision the word "lectures" shall be taken to include Moot Courts.

Examinations will be held immediately after the close of the term upon the subjects and text books embraced in the Curriculum for that term.

The percentage of marks which must be obtained in order to pass any of such examinations is 55 per cent. of the aggregate number of marks obtainable, and 29 per cent. of the marks obtainable on each paper.

Examinations will also take place in the week commencing with the first Monday in September for students who were not entitled to present themselves for the earlier examination, or who having presented themselves thereat, failed in whole or in part.

Students whose attendance at lectures has been allowed as sufficient, and who have failed at the May examinations, may present themselves at the September examinations at their own option, either in all the subjects, or in those subjects only in which they failed to obtain 55 per cent. of the marks obtainable in such subjects. Students desiring to present themselves at the September examinations must give notice in writing to the Secretary of the Law Society, at least two weeks prior to the time fixed for such examinations, of their intention to present themselves, stating whether they intend to present themselves in all the subjects, or in those only in which they failed to obtain 55 per cent. of the marks obtainable, mentioning the names of such subjects.

Students are required to complete the course and pass the examination in the first term in which they are required to attend before being permitted to enter upon the course of the next term.

Upon passing all the examinations required of him in the School, a Student-at-Law or Articled Clerk having observed the requirements of the Society's Rules in other respects becomes entitled to be called to the Bar or admitted to practise as a Solicitor without any further examination.

The fee for attendance for each Term of the Course is the sum of $10, payable in advance to the Secretary.

Further information can be obtained either personally or by mail from the Principal, whose office is at Osgoode Hall, Toronto, Ontario.

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THE Right Honorable Sir John Alexander Macdonald, Q.C., D.C.L., LL.D., K.C.M.G., G.C.B., a member of Her Majesty's Privy Council, sometime Minister of Justice, and for thirty-four years the first Minister of the Crown in Canada, died at Ottawa on Saturday, June 6th.

So heartfelt, spontaneous and full have been the countless tributes to his memory from all parts of the British Empire and elsewhere, that there would seem to be nothing left for us to do but record the sad loss Canada has sustained in the death of the greatest of her sons.

A learned lawyer, with a ready mind and retentive memory, deeply versed in constitutional law; a far-seeing and wise statesman; genial and large-hearted, whom to know was to love; with a knowledge of human nature to a degree surpassed by no man of his time; capable of inspiring the confidence and affection of all classes; with an attractive power, irresistible though unexplainable, and, in that respect alone, not merely wielding an immense influence over his own political supporters, but often disarming his opponents; with no selfish aim, save the ambition to be a leader among men, which, *facile princeps*, he was; not without his faults and failings (for none are perfect, and the supposed exigencies of party politics may have left some blots on the page), but a man who would have been a great man in any part of the Empire; above all, to be remembered as one who passionately loved his country, with unswerving faith in the destiny of Canada, devoting his life and powers to what he considered her best interests—living and dying in harness, and in her service—such was the man who was on Thursday, June 11th, laid to rest at the old city of Kingston, amid the sorrow, not merely of his own land, but of all parts of the Empire, and of his Queen, whose loyal subject he ever was.

Great as is the loss the Dominion has sustained, it would be a poor tribute to his memory for us to call his loss irreparable, for *he* believed in the Canada whose future he so largely moulded, and she has still many sons who love her well. May it be that those who shall succeed him will work as faithfully and loyally for her welfare as he has done.

IN a humorous yet pertinent letter to the London *Times*, Mr. Inderwick suggests that the judges of the Divorce Division, in cases in which it seems to them just and reasonable to do so, be empowered to disregard the restraint on anticipation by which dishonest women are enabled to avoid satisfying their just debts. Experience shows that this is the purpose for which the restraint on anticipation

is employed much more often than the original intention of preventing the undue influence of the husband. Were this power, suggested by the writer of the letter, given to all the courts, substantial justice would, we think, be the result.

By an Act passed at the last session of the Legislative Assembly, referred to in another column, provision was made for a second Junior Judge for the County of York. An appointment to this position has been made in the person of Mr. F. M. Morson, who has already had considerable experience in the duties he is expected to perform, having for some time past presided at the sittings of the Division Courts. We congratulate Mr. Morson on his appointment, and we feel that those litigants who desire a rapid despatch of business will not be disappointed in that respect, at least, by the new appointment.

A point of law, an outcome of the genius of Edison, must necessarily be decided in the near future. Brought up in one of the lower courts of New Jersey, the case was settled before even this lower court had passed upon it. A boarding-house keeper sued a boarder for having spoken into a phonograph words calculated to injure her in business. The plaintiff claimed that it was publication of a slander. We are compelled to differ from our esteemed contemporary, *The Central Law Journal*, which thinks it impossible that words mechanically reproduced could be classified as either written or spoken. Leaving aside the question of libel—and might it not surely be argued that the defendant committed the spoken words into writing—we do not understand that the mere fact that a mechanical instrument repeated the actionable words discharges the defendant from the result of his deliberate act.

When a litigant in the United States has sufficient pertinacity to carry his case to the Supreme Court of that country, it would appear that the chances are he will have to wait some considerable time before the final adjudication. One important case on the list to be tried by this Court, which now stands adjourned until October, has been three years waiting to be heard. It is very evident that there is a necessity for the recent Act of Congress providing for the creation of Appellate Courts, which will to some extent relieve the pressure. In England the aspect is but little brighter. In two cases in which judgment has recently been delivered by the House of Lords, no less period of time than two years and three months has elapsed since the decision of the Court of Appeal. Surely it is but tardy justice that compels a suitor to wait several years before his case is even heard.

Where a parent or guardian of an infant, or a stranger, enters into possession of an infant's land, when does his possession cease to be that of a bailiff? The Queen's Bench Divisional Court say, in *Kent* v. *Kent*, 20 Ont. 445, that the

possession does not become wrongful even after the infant has attained his majority, and that when a person is once in as bailiff, he cannot divest himself of that character, except by going out of possession or receipt of rent and delivering up such possession or receipt to the owner or those acting under him. In arriving at this conclusion, the Court relied on the cases of *Wall* v. *Stanwick*, 34 Chy.D. 763, and *In re Hobbs*, 36 Chy.D. 553. Both of these cases are decisions of a single judge of first instance, and are opposed to at least three decisions of appellate courts of this Province: first, the case of *Re Taylor*, 28 Gr. 640, which was not referred to, and which was a decision on rehearing of the late Court of Chancery; secondly, *Hickey* v. *Stover*, 11 Ont. 106; and thirdly, *Clark* v. *McDonnell*, in the C.P. Division, not yet reported, both of which latter cases were referred to. It appears to us that it is contrary to the comity which should prevail amongst the different Divisions of the High Court for one Divisional Court to refuse to follow the decisions of other branches of the Court of co-ordinate jurisdiction, and to follow in preference the dicta of English judges of first instance, for it will be observed, on reference to the English cases above referred to, that in neither of them was the point in question actually decided. *Lyell* v. *Kennedy*, 14 App. Cas. 437, which was also referred to, was not a case of infancy at all, but the case of one who had avowedly entered into possession for the benefit of the heirs of the last owner, whoever they might prove to be, and who had kept a separate account of the rents and otherwise shown that his possession was that of trustee. After the lapse of twelve years he claimed possession for his own benefit, and the House of Lords held that he had by his own acts shown that he had entered as trustee for whoever might turn out to be rightfully entitled, and it was impossible for him to divest himself of that character. But it appears to us that is a very different case to one where, merely by reason of the infancy of the true owner, the law imputes a character to the possession different from that which the party in possession himself intended to assume.

In *Moore* v. *Bank B.N.A.*, 15 Gr. 319, Mowat, V.C., in discussing English decisions which were in conflict with decisions of our own courts, laid down the rule that the latter must be held to be the law of the Ontario Court until either a contrary rule is asserted by our own Court of Appeal, or receives the express sanction of a higher court in England. This is a good working rule, and it seems to us a pity it is not acted on.

At the recent session of the Legislature a statute was passed (54 Vict., c. 18) some provisions of which effect material modifications in the Devolution of Estates Act. By the recent decisions of the Court of Appeal in *Martin* v. *Magee*, (see *ante* p. 316), and of Falconbridge, J., in *Re Wilson*, 20 Ont., it seemed very probable that the Devolution of Estates Act would be interpreted by the courts in accordance with what may well be presumed to have been the intention of the Legislature in passing it; which we take to be, in the first place, to make the succession to land the same as that to personalty, and, secondly, in all cases to secure the rights of creditors by making the title of land of a deceased owner

come through his personal representative. Having by the Devolution of Estates Act established, as we conceive, these two fundamental principles, the Legislature has now, by the Act we have referred to, introduced a discordant principle by enabling the next of kin or devisees to take immediately from the deceased as formerly, instead of derivatively through his personal representative. It is hardly to be wondered at if so great a change in the law as was effected by the Devolution of Estates Act should be accompanied at first by some little friction. People would not all at once appreciate the change effected thereby, and their being familiar with the old system might at first lead them to think the change effected by the new law as productive of hardship—entirely forgetful of the real and substantial benefits of the Act. It can hardly be doubted that the giving of the personal representative power to wind up the whole estate is an immense boon to the public and a great saving of expense. Neither can it be doubted that if the principle of requiring a title to be deduced through a personal representative were maintained in all cases, it would in the long run tend greatly to the simplification of titles. These benefits were further enhanced by the security which the Devolution of Estates Act afforded to creditors in insuring the due application of all assets of their debtor, whether real or personal, in payment of his debts. These benefits are manifest and obvious, and ought not, it appears to us, to have been jeopardised by any such considerations as appear to have induced the passage of the Act of last session. We understand it has been considered a hardship to require the next of kin or devisee to obtain a deed from the personal represenfative, and for the purpose of saving this trumpery expense the Legislature appears to have been unfortunately induced to accede to a piece of legislation which, we fear, will prove a very costly remedy for a very insignificant complaint.

The first section of the Act provides that "real estate not disposed of or conveyed by executors or administrators within twelve months after the death of the testator or intestate shall, at the expiration of the said period, be deemed thenceforward to be vested in the devisees or heirs beneficially entitled, as such devisees or heirs (or their assigns, as the case may be), without any conveyance by the executors or administrators, unless such executors or administrators, if any, have caused to be registered in the registry office, or Land Titles office where the land is under The Land Titles Act, of the territory in which such realty is situate, a caution under their hands that it is or may be necessary for them to sell the said real estate or part thereof under their powers and in fulfilment of their duties in that behalf; and in case of such caution being so registered, this section shall not apply to the real estate referred to therein for twelve months from the time of such registration, or from the time of the registration of the last of such cautions, if more than one are registered."

The interpretation of this section by judicial decision we predict will prove a very costly business.

First and foremost among the questions to arise is whether or not the section is retrospective in its operation. Many very solid reasons, we believe, may be assigned in favor of the negative. To hold it retrospective would be to divest personal representatives of a considerable portion of the assets of the estate in

their hands for not registering a caution which there was no law enabling them to register. For example, a testator may have died in 1887; yet, according to the Act, if retrospective in its operation, in 1888 the land would have become vested in the devisee because within twelve months from the testator's death no caution had been registered, which until this Act was passed there was no power enabling the personal representative to register. It will be observed that no time is limited after the Act coming into force for registering cautions relating to the estates of persons who have been dead more than twelve months before the passing of the Act; and at the same time no caution is effective unless it is registered within twelve months after the death of the deceased owner. At the same time, the statute is so ambiguously worded that it is susceptible of an *ex post facto* operation. Furthermore, the question must arise: is the Act confined to cases where there is an actual legal personal representative *in esse*, or does it extend to cases where executors have renounced, or have not taken probate, or where no letters of administration have been granted?

It may also be noted that although the last sentence in section 1 inferentially seems to assume that more than one caution may be registered, yet the Act contains no explicit provision enabling any caution to be registered after the lapse of twelve months from the death of the testator or intestate. It will therefore become a serious question with personal representatives, whether their power to deal with the realty of a deceased person can by any possibility be extended beyond two years at the very furthest from their testator's or intestate's death.

The Act, though it vests the land in the devisee, or "heir at law beneficially entitled," is silent as to whether or not he is to take free from the claims of creditors; neither does it exonerate a personal representative from liability in respect of such land, which has, under the Act, become vested in the devisee or "heir beneficially entitled."

We presume an omission to register a caution when one might be registered will render the personal representative liable as for a *devastavit*. But that liability can hardly attach to him when he is precluded by the Act from doing so.

The distinct violation of the fundamental principle upon which the Devolution of Estates Act is based by the recent Act we think is to be regretted. The paltry grievance which it was designed to alleviate is as the dust in the balance compared with the serious difficulties which the Act is likely to create.

By enabling the next of kin to acquire title without the intervention of the personal representative, a premium is offered to them to conceal from the personal representative the real assets of the deceased. This may be very easily done in many cases where a man dies intestate, or makes no specific disposition of his property by his will. He may die entitled to lands of which his next of kin may be well aware, but of which his personal representative may know nothing. The next of kin or devisee henceforward will have a distinct advantage in concealing from the deceased person's personal representative all the information they possess as to his realty, in the hope that the year may elapse without his discovering it, whereupon; by the operation of this Act, it will vest in them without his intervention, and they can thenceforward deal with it as their own.

The best thing that the Legislature can do in regard to section 1 is to repeal it at the earliest moment at its next session, or at all events put it in such a shape that it will not be a perpetual tax on all the land owners in the country in the shape of law suits to find out what it means.

For our own part, we should think it very unsafe to accept a title which depended on the operation of section 1, and should think, notwithstanding its provisions, that a conveyance from the personal representative should be required.

PROVINCIAL LEGISLATION OF 1891.

The session of the Legislative Assembly just closed has not produced the same quantity of legislation as is its wont. The number of original and amending acts is considerably less than that of last year.

The local member who considers it his duty to place himself on record by making some harmless amendment to an existing act has not been as energetic this session as hitherto.

In another column we discuss the effect produced on the Devolution of Estates Act by c. 18, an Act respecting the Sale of Real Estate by Executors and Administrators.

By an amendment to The Public Lands Act, it is no longer necessary for the Crown to expressly reserve to itself mines, minerals, and mining rights when the land is granted for agricultural purposes.

Considerable amendments have been made to The General Mining Act. The price of mining lands has been increased, and a royalty has been imposed upon silver, nickel, and nickel and copper, of three per cent., and all other ores are liable to a similar tax at a rate to be determined. No small amount of dissatisfaction has already been expressed in regard to placing a royalty on nickel, and it is yet to be seen whether the tax will or will not be prejudicial to the mining interest.

An important section has been added to the Judicature Act, by which a judge of the court in which an action is brought to recover damages for bodily injuries, or the referee if the action is tried before one, may order the injured person to be examined by a medical practitioner, who is to be selected by the judge, and may afterwards be a witness at the trial, unless the trial judge shall otherwise direct. This section has been added in consequence of the disadvantage at which a defendant is put in such a case, as evidenced, among other decisions, by *Reily* v. *City of London*, 14 P.R. 171. The English "Regulation of Railways Act," 1888, 31 & 32 Vict., c. 119, s. 26, had already provided for this in the case of a railway accident, but no similar statute was hitherto to be found on our statute books. This would appear to legalize what was previously an assault, which we might, perhaps, better describe as an assault by Act of Parliament.

A provision is made by c. 12, in appeals to the Court of Appeal from the County Courts, allowing appeal books to be type-written, and making it unnecessary to insert therein copies of the exhibits.

The gradual equalization of business in the different divisions of the High Court has produced c. 13, whereby one of the judges of the Chancery Division may be detached therefrom; and it is also provided that in the case of a vacancy occurring in that division, each division shall in future consist of the same number of judges. As a matter of fact, the amount of business now done at the Chancery circuits is considerably less than that done at the assizes. The Chancery Sittings throughout the country are continued in order to answer a very important purpose in the interior economy—or rather emolument—of its judges; but if a proper and adequate method of paying them could be attained, it would be no longer necessary to have judges travelling on circuit to towns where there are very few causes to try, when the Common Law judges are often unable to clear the docket.

On page 161 *ante* we referred to the provision being made by the Legislature for a second junior judge for the County of York, and for the simultaneous sittings of the County Court, Court of General Sessions, and Division Courts. This measure has now become law and an appointment has been made. The Act provides for weekly sittings of the Division Courts in the City of Toronto during the greater part of the year, monthly hearing of judgment summonses, and bi-monthly trials in jury cases.

C. 16 provides that every Justice of the Peace shall within three months of his appointment, or before the first of August next if already appointed, take the oath of office and qualification, and in default of his so doing his commission is then *ipso facto* cancelled.

The Act respecting Trustees and Executors (R.S.O., c. 110) is amended by "The Trustee Act, 1891," which is in effect the English Trustee Act of 1888. By it a trustee, unless expressly forbidden by his trust deed, may invest in terminable debentures or debenture stock of any society or company authorized to loan on real estate which has a paid-up stock of half a million dollars, a reserve fund of not less than 25 per cent. of its paid-up capital, and the market value of whose stock is at a premium of 25 per cent., and which has during the preceding ten years paid a dividend of six per cent. on its ordinary stock. S. 30 of R.S.O., c. 110, nominally repealed, which authorizes similar investments in the debentures of building societies, is re-enacted, qualified by certain restrictions as to reserve fund, market value of stock, and amount of dividend, somewhat less onerous than those just specified. Every society or company of the class first above mentioned, before its debentures become an authorized investment under this Act, must obtain an order of the Governor in Council (*sic*) approving thereof—a restriction which is apparently deemed unnecessary in the case of building societies. S. 9 embodies the case law and practice both in England and Canada as to a trustee not being liable when an investment is made not exceeding one-half the value of the property when the valuation is made by a person reasonably believed to be an able, practical valuer, and s. 10 makes statutory the case law (*vide In Re Salmon Priest* v. *Uppleby*, 42 Chy. D. 351) that where a trustee lends more than the authorized amount on any legitimate security, he shall only be liable to make good the amount advanced in excess of what was

proper. This Act is intended as an enabling one to trustees; but being also retroactive, we may expect to hear of it again.

The Act respecting Assignments and Preferences next undergoes some amendments, the Legislature (to use the words of Mr. Justice Osler in *Gibbons* v. *McDonald*, 18 A.R. 159, "having failed to express themselves intelligibly" on this subject) have finally, after numerous amendments, given up section 2 in disgust and substituted therefor a new section. The manifest intention of this section is to get over the recent decision in the Supreme Court in *Molsons Bank* v. *Halter*, 18 S.C.R. 88, where it was held that the word "preference" means a voluntary preference, that is to say, a spontaneous act of the debtor, and that a mere demand is sufficient pressure by a creditor to take away from a conveyance, transfer, or mortgage, the character of an unjust preference.

It will be noticed that the words "or which have such effect," which were introduced into the repealed section with the evident intention of abolishing the doctrine of pressure in all cases, have been omitted from subsection 1 of the section substituted for the repealed section, which deals with transfers made with intent to defraud, hinder, delay, or prejudice creditors, so that it will still be necessary to prove in such cases the intent in the minds both of the transferor and the transferee.

Subsections (*a*) and (*b*) of section 1, which deals with "effect," apply only to cases of unjust preferences, and enact that the intent shall be presumed if the "transaction has the effect of giving a preference," provided an action is brought within sixty days or the debtor assigns within that time, "whether the same be made voluntarily or under pressure." So that the doctrine as to pressure as revived by *Molsons Bank* v. *Halter* has not been interfered with unless an action to impeach the transaction is brought within sixty days or the debtor assigns within that time.

It is doubtful whether this last attempt of the Legislature will prove more effective than their previous efforts to place the indolent creditor on the same footing as his more energetic brother; and we cannot help feeling that it would be well if the Legislature would take advantage of the act enabling the Court to entertain an action for the declaration of the validity of any statute, to ascertain the exact extent of their power to legislate on this much-debated and most important subject.

Among the original acts passed we find The Woodman's Lien for Wages Act, which facilitates the filing and enforcement of liens by workmen for labor done on logs in the districts of Algoma, Thunder Bay, and Rainy River.

By c. 23, the Society of Friends, or Quakers, are enabled to solemnize marriages according to their own rites, and all marriages thus solemnized previous to this act are declared to be and have been valid. In the Salvation Army, male commissioners and staff officers duly appointed by the society, are authorized to perform the ceremony.

Important amendments, interesting principally to medical practitioners, are made to The Ontario Medical Act.

By c. 30, The Chartered Stenographic Reporters' Association of Ontario is incorporated.

By c. 34 the law of directors' liability is made more stringent. It also provides for the right of directors who have become liable under the act to recover contribution from co-directors.

C. 38, An Act respecting Loan Companies. This act is substantially a re-enactment, with certain changes and additions, of those sections of The Companies Act (Dom.) which relate to loan companies (R.S.C., c. 119, ss. 86-103). Previous to the passing of this act, loan companies might be incorporated either by the Act respecting Building Societies or the Joint Stock Companies Act. The former of these being found too restrictive and the latter not sufficiently so, this present act was the result. It is to be noted that the Ontario act applies only to loan companies which may hereafter be incorporated, and that it does not apply to companies incorporated under the Act respecting Building Societies, unless expressly mentioned.

The Municipal Act, of course, comes in for its share of amendments, which will this year fill fourteen pages of the Statute Book. The amendment of most general interest is section 35, which does away with the effect of the much canvassed case of *Cumberland* v. *Kearns*, 18 O.R. 151; 17 A.R. 281, by enacting that charges on land for local improvements shall not, except as to arrears, come within the scope of the ordinary vendor's covenant against encumbrances. The wording of the section is clumsy, and might lead one to suppose that it is intended also to overrule *Re Graydon and Hammill*, 20 O.R. 199, in which it was held that, as between vendor and purchaser, before the completion of the contract, local improvement rates are encumbrances which the vendor is bound to remove. Possibly such was the intention of the draughtsman—the use of the words "vendor or person agreeing to sell" seems to point to an uncompleted contract rather than to one which has been completed by conveyance—but we think that it will be found that *Re Graydon and Hammill* is still law.

The Drainage Trials Act provides for the appointment of a referee for the purpose of The Ontario Drainage Act and ss. 569 *et seq.* of The Municipal Act. Mr. B. M. Britton, Q.C., of Kingston, has been chosen to fill the position. As the referee has, in effect, all the powers of a judge, it would seem to us that it is open to question whether the Legislature is not again acting *ultra vires*. The fact that he is called a referee does not any the less constitute him a judge.

C. 52 imposes a penalty for the destruction of the plant called Ginseng, the cultivation and care of which for medical purposes has become quite an industry in some places.

By c. 55 the Public Schools Acts are consolidated. An Act respecting Truancy and Compulsory School Attendance is taken principally from the old Public Schools Act. C. 57 consolidates and revises the High Schools Act. The remaining statutes do not seem to call for any special mention.

COMMENTS ON CURRENT ENGLISH DECISIONS.

(Notes on the May Numbers of the Law Reports—continued).

AGREEMENT IN RESTRAINT OF TRADE, REASONABLENESS—INTENTION OF PARTIES.

Mills v. *Dunham* (1891), 1 Ch. 576, was a motion to restrain the defendant from violating an agreement in restraint of trade. The defendant had been in the plaintiffs' employ, and had bound himself that in the event of the termination of the employment he would not, either on his own account or on the account of any employer, "call upon, directly or indirectly solicit orders from, or in any way deal or transact business with" any one who had while the employment was in force been a customer of the plaintiffs. The defendant contended that this agreement was too wide in its terms, and would prohibit the defendant from calling upon the plaintiffs' customers to solicit orders in any other trade in which he might engage. But Chitty, J., was of opinion that the restraining clauses must be construed by reference to the whole agreement, from which it was apparent that it was intended merely to prohibit the defendant from calling on the plaintiffs' customers to solicit orders in any trade similar to that which the plaintiffs were then carrying on, and he granted an injunction accordingly, which was affirmed by the Court of Appeal (Lindley, Lopes, and Kay, L.JJ.).

SOLICITOR AND CLIENT—LIEN ON FUND, EXTENT OF—SECURITY, TAKING, EFFECT OF—WAIVER OF LIEN.

In re Taylor (1891), 1 Ch. 590, one or two points of interest to the profession are determined: as to the nature and extent of the lien to which solicitors are entitled to on the papers of their clients in their hands, and as to the effect on the lien of taking security for their costs. In the present case the solicitors delivered an account to their client claiming a balance due to them of £81, and for which they claimed a lien on the client's papers in their hands. The balance only included one item of £20 for costs, the rest was made up of sums advanced by the solicitors to or on behalf of the client. The client claimed delivery of the papers on payment of the sum of £20, for which alone, it was contended, any lien existed. Stirling, J., thought the lien existed for the whole balance, but he was overruled by the Court of Appeal (Lindley, Lopes, and Kay, L.JJ.), who held that a solicitor's lien only exists in respect of his costs, charges, and expenses, which are the subject of taxation or moderation by the taxing officer. It subsequently appeared that the solicitors had taken a promissory note for the balance due them, and had not expressly reserved their lien; and this was held by the Court of Appeal to amount to a waiver of the lien altogether.

WILL—CONSTRUCTION—CONDITION, "RETURN TO ENGLAND"—VENDOR AND PURCHASER—CONDITIONS OF SALE—RIGHT TO RESCIND, "NOTWITHSTANDING PREVIOUS LITIGATION."

In re Arbib & Class (1891), 1 Ch. 601, was an application under the Vendors and Purchasers Act, in which the construction of a will was involved. The testator appointed F. E. Bucknall one of his executors and trustees, "if and when he shall return to England," and devised his estates to his trustees upon the trusts of the will. F. E. Bucknall was residing in Australia, but eight years after

the testator's death returned to England and remained six months for the benefit of his health, when he went back to Australia, where he had ever since resided, having taken no part in the execution of the trusts, and without having proved the will. The other trustee named in the will, in exercise of a statutory power, appointed another person co-trustee with himself under the will, and they together contracted to sell part of the trust estate to the purchaser; and the question was whether they could make good title in the absence of F. E. Bucknall. North, J., held that they could not, as there had been a substantial compliance with the condition, and that Bucknall had therefore become a trustee. He therefore ordered the vendors to refund the deposit and pay the respondents' costs of investigating the title. The vendors appealed, and on the appeal claimed the right to annul the contract, in the event of the Court upholding the decision of North, J., under a condition of sale which enabled them to do so, "notwithstanding any previous negotiation or litigation"; but the Court of Appeal (Lord Coleridge, C.J., and Lindley and Kay, L.JJ.) affirmed the decision of North, J., and also held that the vendors could not annul the contract after there had been an actual judicial decision on the question of title, as it was then too late to exercise the power of annulling the contract, because the term "litigation" was *not* equivalent to "judicial decision." As Kay, L.J., puts it, it means "litigation pending, not litigation decided adversely to them."

MARRIED WOMAN—COSTS ORDERED TO BE PAID BY MARRIED WOMAN, LIABILITY OF SEPARATE ESTATE FOR—MARRIED WOMAN'S PROPERTY ACT, 1882, S. 1, S-S. 2, S. 19 (R.S.O., C. 132, S. 3, S-S. 2 S. 20).

Cox v. *Bennett* (1891), 1 Ch. 617, was an application by trustees who had obtained an order for payment of costs against a married woman, in an action instituted by her against them without a next friend, for leave to retain the costs out of a sum of money in their hands to which the married woman was entitled, as arrears of income due her, and which was her separate property. The question was whether this fund was answerable for the costs of the proceedings in question, it not having been in the trustees' hands when those proceedings were commenced, and there being a restraint on anticipation. Kekewich, J., held that the trustees were entitled to deduct their costs out of the moneys in question, and the Court of Appeal (Lindley and Kay, L.JJ.) affirmed his decision.

PRACTICE—AFFIDAVIT—DESCRIPTION OF DEPONENT AS "GENTLEMAN"—RULE 528 (ONT. RULE 605).

In re Dodsworth, Spence v. *Dodsworth* (1891), 1 Ch. 657, Chitty, J., explains the effect of *Re Orde*, 24 Ch.D. 271. According to his view of that case, it does not decide that an affidavit in which the deponent is described as "gentleman" cannot be filed, but that it is for the Court to say, having regard to the nature of the application in which the affidavit is used, whether that description is sufficient for the purpose of enabling it to weigh the value of the deponent's evidence. In *Re Orde* the affidavit was one of fitness of a proposed trustee, and the Court then held the description too vague and refused to receive it.

ANCIENT LIGHTS—CROWN PROPERTY VESTED IN TRUSTEES—PREROGATIVE OF CROWN—PRESCRIPTION ACT (2 & 3 W. 4, C. 71), SS. 1, 2, 3.

Perry v. *Eames* (1891), 1 Ch. 658, may be here briefly referred to as showing that the Crown is not bound by the Prescription Act (2 & 3 W. 4, c. 71), and therefore ancient lights cannot be acquired by prescription as against property of the Crown, even though it be vested in trustees. Since R.S.O., c. 111, s. 36, which prevents the acquisition of such rights even as between subject and subject, the case has not much application in Ontario.

INFANTS—GIFT TO CLASS FOR LIFE, CONTINGENTLY ON ATTAINING TWENTY-ONE.

In re Jeffrey, Burt v. *Arnold* (1891), 1 Ch. 671, a testator had directed his trustees to hold the proceeds of the sale of his residuary estate on trust to pay certain annuities, and subject thereto on trust for such of his grandchildren as should attain twenty-one, the shares of those of the grandchildren born in the testator's lifetime being settled on them for life with remainder to their children. A surplus of income after payment of the annuities remained in the hands of the trustees, and the question for North, J., was, who was entitled; some of the grandchildren had attained twenty-one and some had not. The learned judge held that those of the grandchildren who had attained twenty-one were entitled to the surplus income to the exclusion of the rest, and as the others came of age they would be let in to participate in the future surplus income, as it accrued after they had attained twenty-one.

CHARITABLE BEQUEST—WATERWORKS MORTGAGE—PURE OR IMPURE PERSONALTY—MORTMAIN.

In re Parker, Wignall v. *Park* (1891), 1 Ch. 682, a testatrix had bequeathed for charitable purposes a mortgage held by her made by a municipal body, whereby the latter, in exercise of their statutory powers, had mortgaged to the testatrix, "her executors, administrators, and assigns, such proportion of the rents, rates, and waterworks which by the said Acts" were authorized, as the principal sum bore to the whole sum borrowed, to hold until the principal sum and interest should be paid and satisfied. Stirling, J., held that the mortgage was in substance a mortgage of the general undertaking, and did not confer upon the testatrix an interest in land within the Mortmain Acts, and therefore that the mortgage was pure personalty and the bequest was valid.

ANNUITY—LIFE ANNUITY CHARGED ON LAND—SALE OF LAND—RIGHT TO RECEIVE VALUE OF ANNUITY—DEATH OF ANNUITANT BEFORE COMPLETION OF SALE OF LAND.

In re Mabbett, Pitman v. *Holborrow* (1891), 1 Ch. 707. By her will a testatrix bequeathed certain annuities for life which were charged upon real estate. The trustees were empowered to sell the real estate and out of the proceeds purchase Government annuities for the annuitants. The trustees sold, and before the sale was completed one of the annuitants died. After the sale had been completed, but before the Government annuities had been purchased, another annuitant died. The question Kekewich, J., had to decide was whether the representatives of the deceased annuitants were entitled to be paid the amount necessary to purchase

the Government annuities. As regards the representatives of the annuitant who had died before the sale was completed he held they were not entitled, but that the representatives of the annuitant who had survived the completion of the sale were entitled. The will contained a clause against the annuitants being allowed to accept the value of their annuities, but this was held to be void, there being no gift over.

LIQUIDATOR, LIABILITY OF—COMPANY, WINDING UP.

In *Knowles* v. *Scott* (1891), 1 Ch. 717, the status of a liquidator of a company being wound up came up for consideration. The action was brought by a shareholder of a company being wound up against the liquidator, to recover his proportion of the surplus assets of the company. It was admitted that there was no precedent for the action, and Romer, J., held that it could not be maintained, because a liquidator is not a trustee, but rather an agent of the company, and therefore not liable to a third part for negligence apart from misfeasance or personal misconduct. The plaintiff's remedy was, in the opinion of the learned judge, by application to the Court in the winding-up proceedings.

Notes on Exchanges and Legal Scrap Book.

PRINCIPAL AND SURETY, HUSBAND AND WIFE.—Where a wife mortgages her land to secure a debt of her husband, he joining in the mortgage: *Held*, that an extension of time given him in which to pay said debt, without the wife's consent, releases the land. *Barrett* v. *Davis*, 15 South-West Rep. 1011.

THE bar of Missouri will, perhaps, object to the imputation conveyed by the reporter in the syllabus to the case of *State* v. *Jones*, which, though strictly accurate, is somewhat startling. It reads: "Under Rev. Stat. Mo. 1889, s. 2170, providing that where the judge refuses to allow a bill of exceptions, it may be signed by 'three by-standers who are respectable inhabitants of the State.' An attorney employed in the case is not a competent signer." We are glad to learn, from a study of the opinion, that the want of competency does not necessarily arise from a denial of respectability to attorneys as a class—a discovery which will, no doubt, be comforting to them.—*Central Law Journal.*

ADEMPTION—Probably the legal presumption that a gift by a father to one of his children of any large sum of money in his lifetime is intended as an ademption *pro tanto* of what he has left to that one by his will frequently frustrates the father's intention; and the decision of the Court of Appeal in *Lacon* v. *Lacon* (Notes of Cases, *ante* p. 62), reversing that of the Court below, will be hailed with general satisfaction. It may be remembered that Sir E. Lacon was the owner of twenty-one twenty-fourth shares in a brewery business. By his will he

bequeathed those shares to three of his sons, of whom E. was one, providing that, except E., they should not be allowed to take any part in the management of the business. After the date of the will, E., who had been employed in the business for some time at a salary, asked for an increase of it. His father would not grant him this, but gave him, on a reconstitution of the partnership, two shares therein. E. resisted the theory of ademption on the ground that he had purchased the shares, giving his services in exchange and as the consideration for them; and, further, that the presumption of ademption did not even *primâ facie* arise in the case of property of this kind. Mr. Justice Romer disagreed with him on both grounds; but he has been successful in the Court of Appeal. The leading case on this subject is *Ex parte Pye*, 18 Ves. 140, and in the notes on that case in White and Tudor's "Leading Cases" (6th edit., vol. ii., p. 364) will be found many cases showing the strong presumption there is in the eyes of the law, that a gift of a large sum of money to a child is intended by a person in *loco parentis* as an ademption *pro tanto* of any money bequeathed to that child in a will previously made. But we do not generally regard as a gift anything which we have paid for, and what difference can it make that we have not used the medium of exchange, but have given our services instead of a money payment? E.'s two shares were really bought by him, and, therefore, were put out of the power of his father's will. The Court of Appeal seem further to have left open, for the decision of some future leading case, the question whether the presumption of ademption can be applied to shares of this kind.—*Law Journal.*

IMPERSONAL TRUSTS.—In the earlier as well as the latest edition of "Lewin on Trusts," it is stated in general terms that "a trust must be for the benefit of some *person or persons*, and if this ingredient be wanting, as in a trust for keeping up family tombs, the trust is void." The high authority of the learned author, however, appears to be the chief, if not the only, foundation for this proposition. No less than ten cases are, indeed, cited in support of it, but most of these will be found to be cases in which, as in *Lloyd* v. *Lloyd*, 21 Law J. Rep. Chanc. 596; 2 Sim. (N.S.) 255, trusts were attempted to be created without any limit of time, for the repair of family tombs, not forming part of the fabric of the church; while in another case referred to, *Thompson* v. *Shakespear*, 29 Law J. Rep. Chanc. 140, 276; Johns. 612; 1 De G. F. & J. 399, the testator gave property for the formation of a merely private museum, also without any limit of time. Not being charitable trusts, these bequests were clearly void on the ground of perpetuity. In *Thompson* v. *Shakespear* there was the additional circumstance that the trust was also void for uncertainty, but the ground of perpetuity was mentioned by Lord Hatherley in his judgment, and commenting on the cases in *Rickard* v. *Robson*, 31 Law J. Rep. Chanc. 897; 31 Beav. 244, Lord Romilly says: "*Lloyd* v. *Lloyd*, and the other case of *Thompson* v. *Shakespear*, show that a gift merely for the purpose of keeping up a tomb or building which is of public benefit, and only an individual advantage, is not a charitable use, but a perpetuity." These cases, therefore, so far from establishing the proposition for which they are

cited, seem to us to tell in reality the other way. Another class of cases in which a trust has been held valid, though it can hardly be said to be for the benefit of any person or persons, is where provision has been made for the maintenance of favorite animals after their owner's death. Thus, in *Mitford* v. *Reynolds*, 17 Law J. Rep. Chanc. 238; 16 Sim. 105, a testator gave the remainder of his property, "after deducting the annual amount that will be requisite to defray the keep of my horses (which I will and direct be preserved as pensioners)," to the Government of Bengal for a charitable purpose; and the order on further consideration contained a declaration that the provision for the maintenance of the testator's horses was good. The point was probably uncontested. The next case of the kind—*In re Dean; Cooper Dean* v. *Stevens*, 58 Law J. Rep. Chanc. 693; L.R. 41 Chanc. Div. 552—came before Mr. Justice North in 1889. There a testator charged his land with an annuity of £750, to be paid to his trustees during fifty years from his death if any of his horses or hounds should so long live, and declared that the trustees should apply the money in their maintenance, and Mr. Justice North held the trust a valid one. His judgment, which is a valuable statement of the law, begins as follows: "It is said that there is no *cestui que trust* who can enforce the trust, and that the court will not recognise a trust unless it is capable of being enforced by some one. I do not assent to that view. There is not the least doubt that a man may, if he pleases, give a legacy to trustees upon trust to apply it in erecting a monument to himself, either in a church or in a churchyard, or even in unconsecrated ground, and I am not aware that such a trust is in any way invalid, although it is difficult to say who would be the *cestui que trust* of the monument. In the same way I know of nothing to prevent a gift of a sum of money to trustees upon trust to apply it for the repair of such a monument. In my opinion such a trust would be good, although the testator must be careful to limit the time for which it is to last, because, as it is not a charitable trust, unless it is to come to an end within the limits fixed by the rule against perpetuities, it would be illegal. But a trust to lay out a certain sum in building a monument, and the gift of another sum in trust to apply the same to keeping that monument in repair, say for ten years, is, in my opinion, a perfectly good trust, although I do not see who could ask the Court to enforce it. If persons beneficially interested in the estate could do so, then the present plaintiff can do so; but, if such persons could not enforce the trust, still it cannot be said that the trust must fail because there is no one who can actively enforce it." On the other hand, as lending some support to the general proposition quoted at the commencement of this article, we may refer the reader to the observations of Lord Eldon in the well-known case of *Morice* v. *The Bishop of Durham*, 10 Ves. 522, 539, and also to the actual decision in *Brown* v. *Burdett*, 52 Law J. Rep. Chanc. 52; L.R. 21 Chanc. Div. 667, where an eccentric testatrix devised a house to trustees with specific directions to block it up for the term of twenty years, putting only a housekeeper in occupation, and subject thereto to hold it in trust for a devisee in fee, and Vice-Chancellor Bacon, saying he must "unseal this useless, undisposed-of property," held that there was an intestacy for the term. The case, however, was argued on the footing that there was no disposition by

will of the property within the Wills Act, s. 3, and the law of trusts does not seem to have been taken into consideration. We think, on the whole, that if the general proposition to which we have referred is to be retained, it must be taken to be subject to the two exceptions we have stated; also that it deserves consideration, whether the general propositions and these exceptions can consistently stand together.—*Law Journal.*

SLANDER.—Our reports for May contain two interesting cases on the subject of slander, both coming before the public with the *imprimatur* of the Court of Appeal upon them. In *Pittard* v. *Oliver*, 60 Law J. Rep. Q.B. 219; L.R. (1891) 1 Q.B. Div. 474, a guardian of the poor was charged with slandering the late clerk to the guardians in the presence of newspaper reporters, by describing him "as a man who for years had been robbing public money," and referring to his conduct as "the defalcations of an unfaithful servant." These words were used at a meeting of guardians on the question as to whether a sum should be paid to the plaintiff in settlement of his claim against the board. This claim was eventually sent to a referee in an action brought by the plaintiff against the guardians, who found in favor of the plaintiff for the whole amount claimed by him. Thereupon this action was brought, and the jury found "that the words were spoken honestly in the discharge of a public duty, without malice, but carelessly," and gave the plaintiff a verdict for forty shillings damages. Upon further consideration, Mr. Justice Mathew held that the occasion on which the words were uttered was privileged, and gave judgment for the defendant. The plaintiff appealed. It was conceded that the occasion would have been privileged if there had been no reporters present, as it was the duty of the guardians to discuss the conduct of their servants. In Mr. Odger's "Digest of the Law of Libel and Slander," 2nd edition, p. 197, cases of qualified privilege are grouped under three heads: "(1) Where circumstances cast upon the defendant the duty of making a communication to a certain other person, to whom he makes such communication in the *bonâ fide* performance of such duty; (2) where the defendant has an interest in the subject-matter of the communication, and the person to whom he communicates it has a corresponding interest; (3) fair and impartial reports of the proceedings of any Court or of Parliament." The guardian's words were well within either class (1) or class (2), as it was his duty to communicate the fact that the person whose claim they proposed thus to compromise had been cheating them, if he sincerely believed it, to his brother-guardians, and he and they had a corresponding interest in the subject-matter of the communication. The privilege is said to be qualified by that learned author, as it may be taken away if the communication is uttered maliciously, and it has not, therefore, the absolute privilege of a judge of the High Court or a barrister. The simple question for the Court was as to the effect of reporters being present, seeing that the defendant had no moral obligation to make the communication to them, and had no common interest with them in the subject-matter of the communication. Lord Esher distinguished this case from the cases where the confidential privi-

leges had been held lost by the mode in which the communication, otherwise privileged, had been made, namely, on a postcard or in a telegram, and decided that the guardian had not lost his privilege through the presence of the reporters. The rest of the Court came to the same decision, though Lord Justice Fry suggested that it would be well for guardians to hold discussions of this kind in private.

The second case is that of *Speight* v. *Gosnay*, 60 Law J. Rep. Q.B. 231, where the defendant uttered defamatory words about the plaintiff which were not actionable unless special damage was proved. The plaintiff's mother repeated them to the plaintiff, and she told them to a man to whom she was engaged, and who, she alleged, broke off the engagement in consequence. She then sought to make the defendant liable in damages for the slander which he had uttered. The curious point to observe is, that the plaintiff herself was part of the chain by which the slander got to her lover, and "every repetition of a slander is a wilful publication of it, rendering the speaker liable to an action" (Odgers, p. 162). In *Parkins* v. *Scott*, 31 Law J. Rep. Exch. 331; 1 Hurl. & C. 153, Baron Bramwell said: "Where one man makes a statement to another, and that other thinks fit to repeat it to a third, I do not think it reasonable to hold the first speaker responsible for the ultimate consequences of his speech. If I make a statement to a man, I know the consequences of making it to him when I make it; but if I do not desire, and do not authorize the man to whom I make it to repeat it, but he does it, am I to be liable for the consequences of his so doing?" The learned baron might have added an *à fortiori:* Am I to be liable when the slandered person herself brings about the catastrophe by repeating the defamation, when she might have kept silence on the subject? In that case a wife repeated to her husband some vile abuse which another woman had uttered to her, with the result that he would no longer live with her. The Exchequer Division, holding that there was no moral obligation on the wife's part to repeat it, held that the original slanderer was not liable. The Court of Appeal in the recent case came to a similar conclusion. "Here the words," said Lord Justice Lopes, "were untrue, and the mother must have known that they were untrue, and there could not be any obligation either on the mother or the daughter to repeat them to Galloway" (the lover). His lordship also pointed out that there were four classes of cases where the original slanderer could be made liable for the repetition of the slander, viz.: (1) Where he authorized the repetition, (2) where he intended it, (3) where the repetition was the natural consequence of the uttering, and (4) where there was a moral obligation on the person to whom he uttered it to repeat it. This case fell within none of those classes.—*Law Journal.*

Proceedings of Law Societies.

LAW SOCIETY OF UPPER CANADA.

MICHAELMAS TERM, 1890.

The following is a *résumé* of the proceedings of Convocation during the above term:—

The following gentlemen were called to the Bar, viz.:

November 17th—Thomas Dykes Law, with honors and gold medal; John Bell Holden, with honors and silver medal; and John James O'Meara, Edward Bayly, John Reeve, William McBrady, William Mackay, James John McLennan, Charles Joseph McCabe, Edward Samuel Blake Cronyn, Arthur Clayton Sutton, Arthur Ferrier Wilson, Arthur Gordon Smith, William Yorke, John Joseph Hughes, Robert Baldwin, Ernest Willey McIntyre, Thomas Walter Horn, John Henry Dunlop, John McEwen, Charles Perly Smith.

November 18th—William Patrick McMahon.

The following gentlemen were granted certificates of fitness as Solicitors, viz.:

November 17th—J. B. Holden, T. D. Law, E. Bayly, W. McBrady, E. S. B. Cronyn, J. J. Hughes, W. J. Kidd, M. O. Johnston, A. G. Smith, W. Mackay, J. J. Maclennan, J. McEwen, H. W. Steward, H. A. Simpson, W. A. Smith.

November 18th—W. P. McMahon, C. J. McCabe.

" *22nd*—A. Weir, W. L. Morton.

" *23rd*—C. P. Smith.

December 6th—R. Baldwin, E. W. McIntyre.

" *30th*—J. F. Macdonald, P. H. Bartlett.

The following gentlemen passed the Second Intermediate Examination, viz.: —W. S. Morden, C. H. Glassford, A. Bicknell, M. P. McDonagh, J. H. Madden, M. H. McLaughlin, P. A. Malcolmson, W. H. P. Walker, A. L. Malone, J. A. Oliver, F. D. Boggs, C. Pierson, O. Watson, C. J. Lucy.

The following gentlemen passed the First Intermediate Examination, viz.: W. H. Perry, A. E. Shaunessy, J. E. Day, J. M. Pike, J. N. Fish, F. C. Cooke, H. I. Lyon, A. Cowan, M. J. McFarlane, F. C. Kerby, H. M. McConnell, C. G. Powell, J. B. Quinton, G. S. Henderson, F. W. Hall, E. McMartin, C. E. Gillan, H. W. Maw, J. J. Coughlin.

Monday, November 17th.

Convocation met.

Present—The Treasurer, and Messrs. Britton, Christie, Hoskin, Irving, Proudfoot, and Purdom, and in addition, from 11 a.m. to adjournment, Messrs. Ferguson, Foy, Kingsmill, Mackelcan, McCarthy, Moss, Murray, and Osler.

The minutes of last meeting were read and approved.

Mr. Kingsmill, from the Select Committee on Honors and Medals, reported that Messrs. T. D. Law and J. B. Holden are entitled to be called with honors, and that Mr. Law is entitled to receive a gold medal and Mr. Holden a silver medal.

Ordered for immediate consideration, adopted, and ordered accordingly.

The memorial of the Osgoode Legal and Literary Society was read and received.

Ordered for immediate consideration.

Ordered to be further considered when the Report of the Building Committee is taken up.

The letter of Mr. H. R. Hardy was read and received.

Ordered, that the letter be referred to the Reporting Committee, with instructions to report on question involved.

Mr. Hoskin, from the Discipline Committee, presented a report on the case of Mr. F——, to the effect that a *prima facie* case for enquiry had been shown.

Ordered, that the report be considered on 28th inst.

Mr. Hoskin also presented a report on the cases of Messrs. T—— and B——.

Ordered for consideration on the 28th inst.

Mr. Irving gave the following notice of motion:—That he will move at the next meeting that a committee be appointed to consider and report upon a system whereby Benchers not residents of Toronto may be paid the expenses of their attendances at meetings of Convocation, or of committees of which Benchers are members. The Committee to be composed of Messrs. Morris, Moss, Murray, Shepley, Foy, Kingsmill, Ferguson, McCarthy, Robinson, and Irving.

Tuesday, November 18th.

Convocation met.

Present—The Treasurer and Messrs. Foy, Fraser, Irving, Macdougall, Moss, Osler, and Robinson, and in addition, from 11 a.m. to adjournment, Messrs. Bruce, Ferguson, Kerr, Kingsmill, Lash, Martin, Murray, and Purdom.

The minutes of last meeting were read and approved.

Mr. Moss presented the Report of the Legal Education Committee.

The Report was ordered for immediate consideration and adopted.

The petition of certain students, praying for an additional supply of textbooks, was received and read.

Ordered, that the petition be referred to a Special Committee composed of Messrs. Moss, Kingsmill, Lash, Martin, Bruce, Osler, Irving, Ferguson, and Shepley.

A letter from Mrs. M. Bennett was received and read.

Ordered, that it be referred to the Discipline Committee to report whether a *prima facie* case for enquiry is shown.

Mr. Moss presented a Report from the Building Committee.

The Report was ordered for immediate consideration.

The Report was considered and adopted.

The petition of the Osgoode Legal and Literary Society was taken up, and it was

Ordered, that it is not possible to acquire an interest in the Parliament Buildings or U. C. College grounds for the purposes of an athletic club, and that it is not expedient to undertake the erection of a gymnasium in connection with the new Law School building.

Mr. Martin presented the Report of the Inspector of County Libraries, and moved that Mr. Winchester's fee for inspection of $150 be paid.—*Carried.*

Saturday, November 22nd.

Convocation met.

Present—The Treasurer and Messrs. Ferguson, Foy, Irving, and Moss.

The minutes of last meeting were read and approved.

Mr. Moss presented the Report of the Legal Education Committee.

The Report was ordered for immediate consideration, adopted, and ordered accordingly.

The order for the consideration of Mr. Moss' motion as to legislation was adjourned to the next sitting of Convocation.

Friday, November 28th.

Convocation met.

Present—Messrs. Britton, Ferguson, Foy, Hoskin, Lash, Mackelcan, McMichael, Meredith, Murray, and Smith.

In the absence of the Treasurer, Dr. Larratt W. Smith was appointed chairman.

The minutes of last meeting were read and approved.

Mr. Hoskin, from the Discipline Committee, in the case of Mr. F——, reported that a *prima facie* case had been shown.

Ordered, that the case be referred to the Committee for investigation and report.

In the case of Mr. R——, reporting that a *prima facie* case had not been shown.

In the case of Mr. W., reporting that the complaint had been withdrawn, and recommending that no further action be taken by the Committee pending the criminal proceedings taken by the complainants.

In the case of Mr. B., reporting the withdrawal of the complaint.

The Report in the case of Mr. T. was read and received.

Ordered, that further consideration be postponed till the last day of Term, and that Mr. T. be notified through his counsel to attend before Convocation at 11 a.m. on that day.

The Report was read and received, ordered for immediate consideration, and adopted.

A letter was read from Mr. Dickson Patterson, stating that the portrait of Sir Wm. Campbell had been completed, and enclosing his account for $250.

The petition of the Osgoode Legal and Literary Society was read, asking permission to have an "At Home" in the building once a year.

Ordered, that it be deferred till next meeting, on 6th December.

Saturday, December 6th.

Convocation met.

Present—The Treasurer, and Messrs. Bruce, Ferguson, Hardy, Hoskin, Irving, Kerr, McCarthy, Mackelcan, McMichael, Martin, Morris, Moss, and Murray.

Ordered, that the reading of the minutes of the last meeting be postponed.

Mr. Hoskin presented a report in the case of A.M.T., stating that Mr. T.'s counsel has been unable to find his client.

Ordered, that further consideration of the Report be adjourned to the third sitting day of next Term.

Ordered, that Mr. T. be notified through his counsel that Convocation will take action in his case on that day, when he will be at liberty to attend Convocation.

The petition of the Osgoode Hall Lawn Tennis Club, asking that the Law Society provide a suitable dressing-room and an annual grant of fifty dollars to the funds of the club, was refused.

Mr. H. R. Hardy's letter of 5th December was read.

Ordered, that the grant of $100 for Legal Chart of Ontario be continued for 1891.

Mr. Murray, from the Finance Committee, reported that the extra expenditure of the year had involved an overdraft of $1,242, and moved that they be authorized to sell debentures to a limited amount.

Ordered, that the Committee be authorized to sell debentures to such an amount as will leave the cash balance at the close of the year about $1,000.

Tuesday, December 30th.

Convocation met.

Present—The Treasurer, and Messrs. Bruce, Cameron, Ferguson, Foy, Guthrie, Irving, Kingsmill, Lash, Macdougall, Mackelcan, McMichael, Martin, Meredith, Moss, Murray, and Osler.

The minutes of the meetings held on November 28th and December 6th were read and approved.

Ordered, that the use of the hall, Convocation room, Benchers' room, students' reading-room, cloak room, and consultation rooms, be allowed to the Osgoode Legal and Literary Society for four musical and literary entertainments in each year, under arrangements to be submitted to the approval of a Special Committee to be named by Convocation.

Ordered, that the Literary Society be allowed the use of all the rooms, including the library, for one "At Home" to be held in the winter of 1891, under arrangements to be submitted to the approval of a Special Committee to be named by Convocation.

Ordered, that Messrs. Murray, Mackelcan, Lash, Foy, and Osler, be appointed a Select Committee to act under the two foregoing resolutions.

Ordered, that the salary cheques for month of December be dated on 31st December.

Mr. Osler, from the Reporting Committee, recommended that the Official Law List for 1891 be published as of the 1st of March, in the same form as last year, and that Mr. H. R. Hardy be requested to edit the same.

The Report was adopted and ordered accordingly.

Mr. Moss presented the Report of the Law School Building Committee.

The Report was ordered for immediate consideration, and adopted.

Mr. Irving, from the Special Committee on the subject of Students' Text-books, reported that there are now in the library a considerable number of sets of each of the prescribed text-books, and that no increase should be made to the supply of text-books now furnished, and the Committee cannot recommend that the number of books be increased.

The Report was ordered for immediate consideration and was adopted.

The letter of Mr. A. MacMurchy, enclosing a copy of Mr. G. M. Gardner's notice of intention to apply to the Legislature for an Act, was read.

Ordered, that it be referred to a Select Committee, composed of Messrs. Hoskin and Irving, to take the proper action.

The letter of T. F. Lyall, on the subject of his intention to apply for legislation, was read.

Ordered, that it be referred to Messrs. Hoskin and Irving.

Ordered, that it be referred to the Legal Education Committee to prepare and submit to the Attorney-General for consideration legislation in the sense of authorizing Convocation to call to the Bar any solicitor in good standing who has been practising the profession for ten years prior to the first day of July, 1889, on such terms as to examination as may be fixed by Convocation in each case, or by general rule, and on such terms as to special fees as may be fixed by Convocation by general rule.

Ordered, that it be referred to the Legal Education Committee to consider and report on the first day of next Term whether, and if so, on what terms, graduates of the Royal Military College should be admitted and called to the Bar on more favorable conditions than ordinary students and clerks.

Mr. J. F. Smith's letter, as to the presentation of some volumes of the Canadian Almanac, was read.

Ordered, that his kind offer be accepted with the thanks of Convocation.

Mr. Moss, seconded by Mr. Irving, moved,

That Convocation records its regret at the death, on the 10th day of December, 1890, of James Henry Morris, M.A., Q.C., a member of Convocation since Easter Term, 1884, and its deep sense of the loss sustained by his associates.

That a copy of this resolution be suitably engrossed and forwarded to his family—*Carried.*

Ordered, that Mr. Proudfoot be added to the Library Committee in place of the late Mr. Morris.

Ordered, that a special meeting of the Benchers be called for the first day of Hilary Term next, to appoint a Bencher to fill the vacancy caused by the death of the late Mr. Morris.

Convocation adjourned.

J. K. KERR,
Chairman Committee on Journals.

DIARY FOR JUNE.

1. Mon.....First Parliament in Toronto, 1797.
4. Thur.....Lord Eldon born, 1751.
5. Fri.....Battle of Stony Creek, 1813.
6. Sat.....Easter Term ends. Sir John A. Macdonald died.
7. Sun.....*2nd Sunday after Trinity.*
8. Mon.....County Ct. Sitgs. for Motions in York. Surrogate Ct. Sittings. First Parliament at Ottawa, 1866.
10. Wed.....County Ct. Sittings for trial, except in York.
11. Thur.....St. Barnabas. Lord Stanley Governor-General, 1888.
14. Sun.....*3rd Sunday after Trinity.*
15. Mon.....Civil Assizes at Toronto. Magna Charta signed, 1215.
16. Tues.....Battle of Quatre Bras, 1815.
18. Thur.....Battle of Waterloo, 1815.
19. Fri.....Battle of Blenheim, 1704.
20. Sat.....Accession of Queen Victoria, 1837.
21. Sun.....*4th Sunday after Trinity.* Longest day.
22. Mon.....Slavery declared contrary to the law of England, 1772.
24. Wed.....Midsummer day. St. John Baptist.
25. Thur.....Sir M. C. Cameron died, 1887.
28. Sun.....*5th Sunday after Trinity.* Coronation of Queen Victoria, 1838.
29. Mon.....St. Peter.
30. Tues.....Jesuits expelled from France, 1880.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

Div'l Court.] [February 4.

LONEY *v.* OLIVER.

Damages—Measure of—Breach of agreement to convey land—Loss of bargain previously made.

In an action for damages for breach of an agreement by the defendant to convey land to the plaintiff, the plaintiff alleged that, by reason of the breach, certain other persons, to whom he had agreed to sell the land, refused to carry out their agreement with him, and he lost the sale and was deprived of a profit. It appeared that the plaintiff's agreement to sell was prior to his agreement with the defendant, and that the defendant had no notice or knowledge of the prior agreement.

Held, that the plaintiff could not recover; for the damages claimed for the loss of the sale did not naturally flow from the breach of the defendant's agreement. If damages were recoverable at all, the true measure would be the increased value of the land at the time of the breach over the amount of the purchase money; but no evidence was given of any such damages, and evidence of the bargain that the plaintiff made with the other persons, before he bargained with the defendant, was not evidence relevant to this inquiry.

J. W. McCullough, for the plaintiff.

Moss, Q.C., for the defendant.

MR. DALTON.] [February 19.
MACMAHON, J.] [March 19.
Div'l. Court.] [May 21.

REGINA EX REL MCGUIRE *v.* BIRKETT.

Municipal corporations—Controverted municipal elections—Interest of mayor-elect in contract with corporation — Unsettled money claim — Master-in-Chambers, jurisdiction of to try election case—Rule 30—51 Vict., c. 2, s. 4 —Constitutional law—Powers of provincial legislature.

The defendant had a contract with the corporation of a city for the supply of iron up to the end of 1890, but on the 26th November, 1890, he wrote informing the corporation that he withdrew from his contract, and enclosing his account up to date.

On the 9th December, 1890, the then mayor of the city notified the defendant that he would be held responsible for any expense the corporation would be put to in consequence of his refusal to fulfil his contract.

On the 15th December, 1890, the city council adopted a resolution cancelling the defendant's contract and releasing him from any further obligation in connection therewith. At the same meeting a notice of reconsideration was given, which by the rules of the council had the effect of staying all action on the resolution until after reconsideration. There was no reconsideration and no subsequent meeting of the council till the 7th of January, 1891, previous to which the defendant had been elected mayor for 1891. At the time of his election his account above mentioned had not been paid.

Held, by the Master-in-Chambers, that the resolution had no direct effect to release the defendant from liability under his contract, either at law or in equity; and whether or not the resolution was to be considered in force, it did not touch the account, the existence of which unpaid was sufficient to invalidate the election, under the other circumstances of the case.

The election was therefore set aside; but although the relator had notified the electors of the objection to the defendant's qualification, the seat was not awarded to the candidate having the next largest vote, on account of the resolution of the council, which taught the electors to disregard the relator's warning, and a new election was ordered.

Held, by MACMAHON, J., that the Master-in-Chambers had, by the combined effect of Rule 30, 51 Vict., c. 2, s. 4, all the powers of a judge to determine the validity of the election of the defendant, and that his determination was final; and it was within the competence of the provincial legislature to clothe the Master with such powers.

Held, by the Divisional Court, following the principle of the decision in *Re Wilson* v. *McGuire*, 2 O.R. 118, that the provincial legislature had power to invest the Master with authority to try controverted municipal election cases.

Aylesworth, Q.C., and *Latchford*, for the relator.

J. H. Macdonald, Q.C., for the defendant.

Irving, Q.C., for the Attorney-General for Ontario.

Practice.

Chy. Div'l Court.] [March 26.

TOOTHE *v.* FREDERICK.

Arrest—Application for discharge—Rule 1051 — Discretion—R.S.O., c. 67, s. 1—Intent to quit Ontario—Intent to defraud creditors.

An application under Rule 1051 to discharge from custody is an original proceeding, independent of the order to arrest, and the judge to whom it is made is invested with a very large discretion.

If the Appellate Court has doubt as to the proper result of all the evidence, that doubt should lead in favor of personal liberty.

Our statute, 22 Vict, c. 96 (now R.S.O., c. 67, s. 1), differs from the original, the Imperial Act 1 & 2 Vict., c. 110, and was expressly enacted so as to restrain the freedom of those only who were believed to be contemplating fraud as against their creditors; under it, it cannot be said that a person indebted, without substance, who contemplates removing from Ontario to better his condition, is leaving with intent to defraud creditors; two things must concur before the statute operates: the quitting of Ontario, and an intent thereby to defraud creditors.

Robertson v. *Coulton*, 9 P.R. 18, observed upon.

Upon the evidence in this case, the Court was not satisfied that the defendant had any intention to flee the country at the time of his arrest, or that there was such dealing with his property as was within the meaning of the statute, and affirmed an order of a Judge-in-Chambers discharging him from custody.

Aylesworth, Q.C., for the plaintiff.

W. R. Meredith, Q.C., for the defendant.

MEREDITH, J.] [May 19.

IN RE WILSON.

Infants—Maintenance — Interest on funds in hands of trustees—Order for application of—Jurisdiction—Summary application—Judge-in-Chambers—Evidence—Safeguards.

Under the will of their father two infants were entitled each to a sum of $500, which trustees were directed to invest at interest until the infants should be of full age, and then to pay to them.

Held, that a Judge-in-Chambers had jurisdiction, upon a summary application, to make an order authorizing the trustees to apply the interest for the maintenance of the infants; but such an order should not be made except upon the clearest and most satisfactory evidence; as much evidence, at least, as is required upon an application for the sale of infants' lands for their maintenance should be required, and the like safeguards against deception and mistake should be insisted upon.

Purdom for the applicant.

F. W. Harcourt for the official guardian.

ROSE, J.] [May 23.

ROGERS *v.* KNOWLES.

Arrest—Intent to quit Ontario—Intent to defraud creditors—Absence of assets in Ontario.

Application to discharge the defendant from arrest under an order, upon the ground that the defendant was not at the time of the making of the order about to quit Ontario with intent to defraud his creditors,

Held, that there was no sufficient ground for keeping the defendant in custody, as upon the

evidence it could not be concluded that he intended to quit Ontario for the purpose of defrauding his creditors.

If a man has no assets, his leaving the country affords no evidence in itself of any intention to defraud creditors; or, in other words, if a debtor's remaining in the province can be of no assistance to his creditors in recovering their debts, his leaving the province cannot by any possibility be a fraud upon such creditors.

Toothe v. *Frederick*, *ante*, followed.

C. C. Robinson for the plaintiffs.

D. Urquhart for the defendant.

STREET, J.] [June 1.

MOODY *v.* CANADIAN BANK OF COMMERCE.

Judgments—Set-off—Assignment for benefit of creditors—Order for entry of judgment—R.S.O., c. 124, s. 23.

After recovery of judgment by the defendants against the plaintiff for a debt and costs, the plaintiff recovered judgment against the defendants in a separate action for damages for malicious prosecution and costs. Before the verdict for damages was actually given, the plaintiff executed an assignment to a trustee for the benefit of his creditors of the amount of any verdict which he might recover, but this assignment was not delivered until after the verdict had been rendered and an order for the entry of judgment upon it made by the trial judge.

Held, that at the time the assignment was delivered the claim to damages had become a judgment debt, and, as such, a debt which should be set-off under the principle of s. 23 of R.S.O., c. 124; and, upon the application of the defendants, an order directing a set-off was made.

Lash, Q.C., for the defendants.

Aylesworth, Q.C., for the assignee.

Appointments to Office.

COUNTY COURT JUDGES.

County of Essex.

Henry Theophilus Waring Ellis, of the town of Windsor, in the Province of Ontario, Esquire, and of Osgoode Hall, Barrister-at-law; to be Deputy Judge of the County Court of the county of Essex, in the said Province of Ontario.

County of Peel

James Fleming, of the town of Brampton, in the Province of Ontario, Esquire, and of Osgoode Hall, Barrister-at-law; to be Deputy Judge of the County Court of the county of Peel, in the said Province of Ontario.

County of Wentworth.

William A. H. Duff, of the city of Hamilton, in the Province of Ontario, Esquire, and of Osgoode Hall, Barrister-at-law; to be Deputy Judge of the County Court of the county of Wentworth in the said Province of Ontario.

County of York.

Frederick Montye Morson, of the city of Toronto, in the Province of Ontario, Esquire, and of Osgoode Hall, Barrister-at-law; to be a Junior Judge of the County Court of the county of York, in the said Province of Ontario, with the style and title of the Second Junior Judge of the county of York.

Frederick Montye Morson, Esquire, the Second Junior Judge of the county of York, in the Province of Ontario; to be a Local Judge of the High Court of Justice for Ontario.

LOCAL REGISTRAR.

United Counties of Stormont, Dundas, and Glengarry.

John Angus McDougald, of the village of Alexandria, in the county of Glengarry, Esquire, to be Local Registrar of the High Court and Clerk of the County Court in and for the United Counties of Stormont, Dundas, and Glengarry, in the room and stead of Alexander E. McDonald, Esquire, deceased.

POLICE MAGISTRATE.

County of Dundas.

George Samuel Hanes, of the village of Iroquois, in the County of Dundas, Esquire, to be Police Magistrate in and for the said village of Iroquois, *pro tempore*, without salary.

ASSOCIATE CORONERS.

County of Lambton.

Charles Richard Charteris, of the village of Florence, in the county of Lambton, Esquire, M.D., to be an Associate Coroner within and for the said county of Lambton, in the room and stead of Myers Davison, Esquire, M.D., deceased.

County of York.

William Henry Taylor, of the village of Bradford, in the county of Simcoe, Esquire, M.D., to be an Associate Coroner in and for the county of York.

DIVISION COURT CLERKS.

District of Muskoka.

William Rutherford Tudhope, of the village of Gravenhurst, in the district of Muskoka, Gentleman, to be Clerk of the Second Division Court of the said district of Muskoka, in the room and stead of J. H. Jackson, resigned.

United Counties of Northumberland and Durham.

Henry Elliott, of the village of Osaca, in the county of Durham, one of the United Counties of Northumberland and Durham, Gentleman, to be Clerk of the Fourth Division Court of the said United Counties of Northumberland and Durham, in the room and stead of John Hunter, resigned.

DIVISION COURT BAILIFFS.

County of Essex.

Aurele Pacaud, of the town of Windsor, in the county of Essex, to be Bailiff of the Seventh Division Court of the said county of Essex, in the room and stead of Andrew Botsford, deceased.

United Counties of Leeds and Grenville.

James Peter Lawrence, of the village of Spencerville, in the county of Grenville, one of the United Counties of Leeds and Grenville, to be a Bailiff of the Tenth Division Court of the said United Counties of Leeds and Grenville, in the room and stead of H. E. Lawrence, resigned.

County of Lincoln.

James F. Carter, of the village of Beamsville, in the county of Lincoln, to be Bailiff of the Fourth Division Court of the said county of Lincoln, in the room and stead of F. B. Rodgers, resigned.

United Counties of Northumberland and Durham.

Luke Berry, of the village of Warkworth, in the county of Northumberland, one of the United Counties of Northumberland and Durham, to be Bailiff of the Ninth Division Court of the said United Counties of Northumberland and Durham, in the room and stead of David Robertson, resigned.

United Counties of Prescott and Russell.

Martin Costello, of the village of L'Original, in the county of Prescott, one of the United Counties of Prescott and Russell, to be Bailiff of the First Division Court of the said United Counties of Prescott and Russell, in the room and stead of George Gale, resigned.

County of Welland.

Elston Priestman, of the township of Wainfleet, in the county of Welland, to be Bailiff of the Second Division Court of the said county of Welland, in the room and stead of Vernon H. Robinson, resigned.

COMMISSIONERS FOR TAKING AFFIDAVITS.

City of Melbourne, Australia.

Frederick Elliott Grant, of the city of Melbourne, in the colony of Victoria, Esquire, Solicitor; to be a Commissioner for administering oaths in the Supreme Court and in the Exchequer Court of Canada.

City of Montreal.

Charles Robson Black, of the city of Montreal, in the Province of Quebec, Esquire, to be a Commissioner for taking Affidavits within and for the said city of Montreal, and not elsewhere, for use in the Courts of Ontario.

Ambrose Leonard Kent, of the city of Montreal, in the district of Montreal and Province of Quebec, Esquire, to be a Commissioner for taking Affidavits within and for the said city of Montreal, and not elsewhere, for use in the Courts of Ontario.

Alphonse Turcotte, of the city of Montreal, in the district of Montreal and Province of Quebec, Esquire, to be a Commissioner for taking affidavits within and for the said city of Montreal, and not elsewhere, for use in the Courts of Ontario.

COUNTY OF YORK LAW ASSOCIATION LIBRARY.

Latest additions:

British Columbia Law Reports.

Canada Gazettes, 1841-1868, 34 vols.

Congdon, F. T., Digest of the Nova Scotia Reports, Toronto, 1890.

Emden, A., Digest of English Reports for 1890, London, 1891.

Exchequer Reports of Canada, vol. 1, first part of vol. 2, Ottawa, 1891.

Foote's Private International Jurisprudence, London, 1891.
Harris, S. F., Criminal Law, 5th edition, London, 1889.
Houston, Wm., Documents of the Canadian Constitution, Toronto, 1891.
Nova Scotia Reports, 1834-1889, 23 vols.;
Northwest Territories Reports.
Quebec Statutes, 54 Vict., 1891.
Schouler, J., Domestic Relations, 4th edition, Boston, 1889.
Sebastian, L. B., Trade Marks, 3rd edition, London, 1890.
Shearman, T. G., and Redfield, A., Negligence, 4th edition, New York, 1888.
Simpson, A. H., Infants, 2nd edition, London, 1890.
Widdifield, C. H., Taxation of Costs, Toronto, 1891.

Law Students' Department.

EXAMINATION BEFORE EASTER TERM: 1891.

CERTIFICATE OF FITNESS.

Taylor on Equity.

Examiner: A. W. AYTOUN-FINLAY.

1. What must be shown in order to entitle a party to equitable relief in the case of a lost deed?

2. An intending testator directs a will to be made by which a considerable sum of money is bequeathed to A.

Just before the hour fixed for the execution of the will, the intending testator dies.

What relief, if any, will be granted in equity to A.?

3. What must be shown in order to support a family compromise, which apparently imposes unequal terms upon the parties?

4. Where there is an alleged mistake in a will, what is the essential condition upon which a court of equity has jurisdiction to correct it?

5. Property is devised to A., a widow, conditioned that the devise shall become inoperative in the event of the devisee remarrying. How far is this a valid condition?

6. A., the guardian of B., an infant, executes a deed of conveyance of land belonging to B. to C. B. knows the facts but he says nothing, and signs the deed of conveyance as a witness. Is B. estopped by his apparent acquiescence?

7. A., a widow, is dowable of an estate, but prior to her dower being set out by metes and bounds, a considerable amount of timber is cut down on the estate and sold.

Has A. any claim to relief on this ground, and, if so, what relief?

8. In what cases, if any, will possession of land, contracted to be sold, be deemed a part performance where the vendee is tenant to the vendor?

9. A testator bequeaths property to his wife. What must be shown in order to put her to her election of dower or bequest?

10. How far is the judgment of arbitrators conclusive—

(a) In matters of law?

(b) In matters of fact?

Benjamin on Sales.

Examiner: A. W. AYTOUN-FINLAY.

1. Up to what time has a bidder at a sale by auction a right to retract his offer?

2. No price has been fixed by the parties on a sale of goods. What price will be implied by law, and how is the estimation of the actual amount arrived at?

3. An agreement is made for the sale of growing crops, being:

(*a*) *Fructus industriales;*

(*b*) Unsevered *fructus naturales.*

How do the provisions of the Statute of Frauds apply in each case?

4. Explain the legal acceptation and meaning of "delivery," "acceptance," and "receipt," as used in the Statute of Frauds.

5. A. bargains in advance for all the peas raised by B. on his farm, A. supplying sacks to B. in which to put the peas. B. puts a certain portion of his crop in A.'s sacks and weighs them. How far is this a *delivery* of these peas?

Hawkins on Wills.

Examiner: M. G. CAMERON.

1. What is the general test of an equivocal description in a will? Give an example.

2. A. by will directed that the balance of his personal property, consisting of notes and other securities for money, be given to B. and C., and if there should be any effects possessed by him at the time of his decease, that the same might

be divided equally in value between D. and E., share and share alike. At the time of his decease, A. owned 100 acres of land; would the land pass under this devise? Explain.

3. A. by will bequeaths Whiteacre to B., his widow, to divide among C. and D., his children, as she shall think proper. B. dies without making any selection. Is the gift void? Explain.

4. A. by his will makes a gift to the children of his daughter B. B., who died prior to the date of the will, left no children, but left grandchildren then living. Will they take? Would it make any difference if B. had been living and had no children but only grandchildren at the date of the will?

5. A. by will bequeaths the interest of a fund to B. for life, and after his decease to C. without condition. What interest does C. take? Explain.

Armour on Titles, Statute Law, and Pleading and Practice.

Examiner: M. G. CAMERON.

1. When, if at all, will the taking of possession be considered as a waiver of objection to title?

2. Set out in detail what a solicitor's abstract of title should show.

3. A. conveys a parcel of land to B. The conveyance, which is duly registered, contains a recital of a mortgage previously made by A. to C. upon the same land. The mortgage is unregistered. What, if any, are C.'s, the mortgagee's, rights against B.'s? Explain.

4. Where it is necessary to produce and prove an original instrument, when will the production of a certified copy thereof be accepted as sufficient evidence?

5. When is a power of attorney revocable, and when, if at all, is it ever irrevocable?

6. What is meant by taking the account with rests?

7. When, if at all, will a judge on appeal from the decision of a Master reverse his finding on a question of fact?

8. A testator dies on the 1st June, 1890. Within what time may a legatee or next of kin bring an action for the administration of his estate?

9. When, if at all, will a defendant in an action of seduction be entitled to particulars of the times and places of the alleged seduction?

10. A mortgage provides that in default of payment of the interest thereby secured, the principal thereby secured shall become one and payable. Default in payment of the interest is made. Can the mortgagee proceed for the recovery of the principal and interest? What, if any, are the rights of the mortgagor?

Flotsam and Jetsam.

A COUNTRY laird, who had lately been elected to the office of justice of the peace, meeting a clerical gentleman on horseback, attempted jocularity by remarking that he was more ambitious than his Master, who was content to ride upon an ass. "They canna be gotten noo," said the minister, "for they're a' made justices o' the peace."—*Ex.*

WOULDN'T COMMIT HIMSELF.—A county judge sends us the following answer, given in one of his courts by a witness in a case being tried: "He brought it around, so as to give one to understand that he meant you to believe that he might want such a stick." Would we be wrong in assuming that this answer, standing alone, was not considered evidence of such a distinct and positive character as clearly and without doubt to establish the liability of the defendant for the "stick"?

HIGHLAND WITNESSES.—A bevy of Highland witnesses in homespun thronged the Parliament House corridors one day last month, and in Court each was giving his own ideas about a march dyke. One of them was asked whether a certain place was east or west of the said march dyke; and for long the canny Celt was puzzled to say. The question was more than once repeated. "Dear me!" exclaimed the advocate, testily, "can't you answer? Was it east or west of the dyke?" "Well, sir," replied the witness, slowly and with much deliberation, "it would just be very nearly half way." We remember another Highland witness in a right-of-way case some years ago, similarly hesitating over a simple question, until counsel lost patience. "Now, sir, do you understand me?" "Yes." "Then can't you give me a rational answer to the question?"

"No, I cannot," said the Celt, with some warmth. "And pray, why not?" "Because I'm on my oath!"—*Journal of Jurisprudence.*

THE LAW AND THE LADY.—Patient man—"Suppose a woman makes it so hot for her husband that he can't live with her, and he leaves her, what can she do?" Lawyer—"Sue him for support." Patient man—"Suppose she has run him so heavily into debt that he can't support her, because his creditors grab every dollar as quick as he gets it, besides ruining his business with their suits?" Lawyer—"If for any reason whatever he fail to pay her the amount ordered, he will be sent to jail for contempt of court." Patient man—"Suppose she drives him out of the house with a flat-iron, and he's afraid to go back?" Lawyer—"She can arrest him for desertion." Patient man—"Well, I don't see anything for me to do but to go hang myself." Lawyer—"It's against the law to commit suicide, and if you get caught attempting it, you'll be fined and imprisoned. Ten dollars, please. Good-day."—*Irish Law Times.*

LITTELL'S LIVING AGE.—The numbers of *The Living Age* for the weeks ending June 6th and 13th contain The Rewards and Responsibilities of Medical Practice, *London Quarterly;* Italian Secret Societies, and Wit in the Pulpit, *Contemporary;* Legal and Constitutional Aspects of the Lynching at New Orleans, by JAMES BRYCE, M.P., *New Review;* Sarsfield: A Jacobite Rapparee, and Through Chinese Spectacles, *Temple Bar;* John Murray and His Friends, *Blackwood;* Memoir of John Murray, by Mr. GLADSTONE, *Murray's;* On Autographs, *Longman's;* Statesmen of Europe: France, *Leisure Hour;* The Mafia in Sicily, *Speaker;* The Secret of Delphi, *Spectator;* The Madeira of the Pacific, *Chambers';* Destruction of the Ancient Monuments of Egypt, *Academy;* The Body of Sir Francis Xavier, *Times of India;* with instalments of "In the Park," "La Bella," and "Sweet Nancy," and poetry. For fifty-two numbers of sixty-four large pages each (or more than 3,300 pages a year) the subscription price ($8) is low; while for $10.50 the publishers offer to send any one of the American $4.00 monthlies or weeklies with *The Living Age* for a year, both postpaid. LITTELL & CO., Boston, are the publishers.

Law Society of Upper Canada.

THE LAW SCHOOL, 1891.

LEGAL EDUCATION COMMITTEE.

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J. V. TEETZEL, Q.C.

This notice is designed to afford necessary information to Students-at-Law and Articled Clerks, and those intending to become such, in regard to their course of study and examinations. They are, however, also recommended to read carefully in connection herewith the Rules of the Law Society, copies of which may be obtained from Principal of the Law School, Osgoode Hall, Toronto.

Those Students-at-Law and Articled Clerks, who, under the Rules, are required to attend the Law School during all the three terms of the School Course, will pass all their examinations in the School, and are governed by the School Curriculum only. Those who are entirely exempt from attendance in the School will pass all their examinations under the existing Curriculum of The Law Society Examinations as heretofore. Those who are required to attend the School during one term or two terms only will pass the School Examination for such term or terms, and their other Examination or Examinations at the usual Law Society Examinations under the existing Curriculum.

Provision will be made for Law Society Examinations under the existing Curriculum as formerly for those students and clerks who are wholly or partially exempt from attendance in the Law School.

Each Curriculum is therefore published herein accompanied by those directions which appear to be most necessary for the guidance of the student.

CURRICULUM OF THE LAW SCHOOL, OSGOODE HALL, TORONTO.

Principal, W. A. REEVE, M.A. Q.C.

Lecturers: E. D. ARMOUR, Q.C.
A. H. MARSH, B.A., LL.B., Q.C.
R. E. KINGSFORD, M.A., LL.B.
P. H. DRAYTON.

The School is established by the Law Society of Upper Canada, under the provisions of rules passed by the Society with the assent of the Visitors.

Its purpose is to promote legal education by affording instruction in law and legal subjects to all Students entering the Law Society.

The course in the School is a three years' course. The term commences on the fourth Monday in September and closes on the first Monday in May; with a vacation commencing on the Saturday before Christmas and ending on the Saturday after New Year's Day.

Students before entering the School must have been admitted upon the books of the Law Society as Students-at-Law or Articled Clerks. Admission is to be gained during Easter and Trinity terms only. The steps required to procure such admission are provided for by the rules of the Society, numbers 126 to 141 inclusive.

The School term, if duly attended by a Student-at-Law or Articled Clerk is allowed as part of the term of attendance in a Barrister's chambers or service under articles.

The Law School examinations at the close of the School term, which include the work of the first and second years of the School course respectively, constitute the First and Second Intermediate Examinations respectively, which by the rules of the Law Society, each student and articled clerk is required to pass during his course; and the School examination which includes the work of the third year of the School course, constitutes the examination for Call to the Bar, and admission as a Solicitor.

Honors, Scholarships, and Medals are awarded in connection with these examinations. Three Scholarships, one of $100, one of $60, and one of $40, are offered for competition in connection with each of the first and second year's examinations, and one gold medal, one silver medal, and one bronze medal in connection with the third year's examination, as provided by rules 196 to 205, both inclusive.

The following Students-at-Law and Articled Clerks are exempt from attendance at the School.

1. All Students-at-Law and Articled Clerks attending in a Barrister's chambers or serving under articles elsewhere than in Toronto, and who were admitted prior to Hilary Term, 1889.

2. All graduates who on the 25th day of June, 1889, had entered upon the *second* year of their course as Students-at-Law or Articled Clerks.

3. All non-graduates who at that date had entered upon the *fourth* year of their course as Students-at-Law or Articled Clerks.

In regard to all other Students-at-Law and Articled Clerks, attendance at the School for one or more terms is compulsory as provided by the Rules numbers 155 to 166 inclusive.

Any Student-at-Law or Articled Clerk may attend any term in the School upon payment of the prescribed fees.

Students and clerks who are exempt, either in whole or in part, from attendance at The Law School, may elect to attend the School, and to pass the School examinations, in lieu of those under the existing Law Society Curriculum. Such election shall be in writing, and, after making it, the Student or Clerk will be bound to attend the lectures, and pass the School examination as if originally required by the rules to do so.

A Student or Clerk who is required to attend the School during one term only, will attend during that term which ends in the last year of his period of attendance in a Barrister's Chambers or Service under Articles, and will be entitled to present himself for his final examination at the close of such term in May, although his period of attendance in Chambers or Service under Articles may not have expired. In like manner those who are required to attend during two terms, or three terms, will attend during those terms which end in the last two, or the last three years respectively of their period of attendance, or Service, as the case may be.

Every Student-at-Law and Articled Clerk before being allowed to attend the School, must present to the Principal a certificate of the Secretary of the Law Society shewing that he has been duly admitted upon the books of the Society, and that he has paid the prescribed fee for the term.

The Course during each term embraces lectures, recitations, discussions, and other oral

methods of instruction, and the holding of moot courts under the supervision of the Principal and Lecturers.

During his attendance in the School, the Student is recommended and encouraged to devote the time not occupied in attendance upon lectures, recitations, discussions or moot courts, in the reading and study of the books and subjects prescribed for or dealt with in the course upon which he is in attendance. As far as practicable, Students will be provided with room and the use of books for this purpose.

The subjects and text-books for lectures and examinations are those set forth in the following Curriculum :

FIRST YEAR.

Contracts.

Smith on Contracts.
Anson on Contracts.

Real Property.

Williams on Real Property, Leith's edition.

Common Law.

Broom's Common Law.
Kerr's Student's Blackstone, Books 1 and 3

Equity.

Snell's Principles of Equity.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

SECOND YEAR.

Criminal Law.

Kerr's Student's Blackstone, Book 4.
Harris's Principles of Criminal Law.

Real Property.

Kerr's Student's Blackstone, Book 2.
Leith & Smith's Blackstone.
Deane's Principles of Conveyancing.

Personal Property.

Williams on Personal Property.

Contracts and Torts.

Leake on Contracts.
Bigelow on Torts—English Edition.

Equity.

H. A. Smith's Principles of Equity.

Evidence.

Powell on Evidence.

Canadian Constitutional History and Law.

Bourinot's Manual of the Constitutional History of Canada. O'Sullivan's Government in Canada.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to the above subjects as shall be prescribed by the Principal.

THIRD YEAR.

Contracts.

Leake on Contracts.

Real Property.

Dart on Vendors and Purchasers.
Hawkins on Wills.
Armour on Titles.

Criminal Law.

Harris's Principles of Criminal Law.
Criminal Statutes of Canada.

Equity.

Lewin on Trusts.

Torts.

Pollock on Torts.
Smith on Negligence, 2nd edition

Evidence.

Best on Evidence.

Commercial Law.

Benjamin on Sales.
Smith's Mercantile Law.
Chalmers on Bills.

Private International Law.

Westlake's Private International Law.

Construction and Operation of Statutes.

Hardcastle's Construction and Effect of Statutory Law.

Canadian Constitutional Law.

British North America Act and cases thereunder.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

During the School term of 1890-91, the hours of lectures will be 9 a.m., 3.30 p.m., and 4.30 p. m., each lecture occupying one hour, and two lectures being delivered at each of the above hours.

Friday of each week will be devoted exclusively to Moot Courts. Two of these Courts will be held every Friday at 3.30 p.m., one for the Second year Students, and the other for the Third year Students. The First year Students will be required to attend, and may be allowed to take part in one or other of these Moot Courts.

Printed programmes showing the dates and hours of all the lectures throughout the term, will be furnished to the Students at the commencement of the term.

GENERAL PROVISIONS.

The term lecture where used alone is intended to include discussions, recitations by, and oral examinations of, students from day to day, which exercises are designed to be prominent features of the mode of instruction.

The statutes prescribed will be included in and dealt with by the lectures on those subjects which they affect respectively.

The Moot Courts will be presided over by the Principal or the Lecturer whose series of lectures is in progress at the time in the year for which the Moot Court is held. The case to be argued will be stated by the Principal or Lecturer who is to preside, and shall be upon the subject of his lectures then in progress, and two students on each side of the case will be appointed by him to argue it, of which notice will be given at least one week before the argument. The decision of the Chairman will be pronounced at the next Moot Court, if not given at the close of the argument.

At each lecture and Moot Court the roll will be called and the attendance of students noted, of which a record will be carefully kept.

At the close of each term the Principal will certify to the Legal Education Committee the names of those students who appear by the record to have duly attended the lectures of that term. No student will be certified as having duly attended the lectures unless he has attended at least five-sixths of the aggregate number of lectures, and at least four-fifths of the number of lectures of each series during the term, and pertaining to his year. If any student who has failed to attend the required number of lectures satisfies the Principal that such failure has been due to illness or other good cause, the Principal will make a special report upon the matter to the Legal Education Committee. For the purpose of this provision the word "lectures" shall be taken to include Moot Courts. Examinations will be held immediately after the close of the term upon the subjects and text books embraced in the Curriculum for that term.

The percentage of marks which must be obtained in order to pass any of such examinations is 55 per cent. of the aggregate number of marks obtainable, and 29 per cent. of the marks obtainable on each paper.

Examinations will also take place in the week commencing with the first Monday in September for students who were not entitled to present themselves for the earlier examination, or who having presented themselves thereat, failed in whole or in part.

Students whose attendance at lectures has been allowed as sufficient, and who have failed at the May examinations, may present themselves at the September examinations at their own option, either in all the subjects, or in those subjects only in which they failed to obtain 55 per cent. of the marks obtainable in such subjects. Students desiring to present themselves at the September examinations must give notice in writing to the Secretary of the Law Society, at least two weeks prior to the time fixed for such examinations, of their intention to present themselves, stating whether they intend to present themselves in all the subjects, or in those only in which they failed to obtain 55 per cent. of the marks obtainable, mentioning the names of such subjects.

Students are required to complete the course and pass the examination in the first term in which they are required to attend before being permitted to enter upon the course of the next term.

Upon passing all the examinations required of him in the School, a Student-at-Law or Articled Clerk having observed the requirements of the Society's Rules in other respects becomes entitled to be called to the Bar or admitted to practise as a Solicitor without any further examination.

The fee for attendance for each Term of the Course is the sum of $10, payable in advance to the Secretary.

Further information can be obtained either personally or by mail from the Principal, whose office is at Osgoode Hall, Toronto, Ontario.

The Canada Law Journal.

VOL. XXVII. JULY 16, 1891. No. 12.

IT is always well that people should act up to their convictions. Mr. R. J. Wicksteed, of the Law Department in the House of Commons, having taken strong ground to the effect that a notary public should be required to take an oath of office, called upon the judge of the County Court to administer to him, as a notary, an oath in the form usually taken by these officials in England. We do not quite see the authority that the county judge had for administering the oath, except on the principle alluded to by a well-known text writer, that judges frequently act without law, and in some cases have power to make rules for their own guidance. We think Judge Ross must have had these two propositions in his mind when he administered the oath.

REPORT OF THE MASTER OF TITLES.

The last Report of the Master of Titles shows that the Torrens system of registration of titles is making satisfactory progress. Although the actual volume of business done in the Toronto office during the past year appears to have been somewhat less than in the preceding year, and notwithstanding the reduction of the fees of office, it is satisfactory to find that the receipts were still more than sufficient to cover the expenses of the office by $1245.45. During the year, land to the value of $922,680 was brought under the Act. The present value of lands now under the Act in the County of York is estimated to be no less than $11,000,000. The amount at the credit of the Assurance Fund is now $13,318.27, of which $12,365.38 has been paid in respect of lands in the County of York, and the remainder, $952.89, in respect of lands in the districts.

The petty expense of bringing the land under the Act in the case of newly-patented lands in the districts is, we find from the Report, very unreasonably regarded as a grievance, notwithstanding the expense is less than would be incurred if the patent were registered in full under the old method of registration.

The table appended to the Report is interesting; it shows the value of each parcel brought under the Act during the past year, and the office fees paid on each parcel. The comparatively small amount of these fees must strike everyone with some surprise. The highest amount paid for fees was $76.70, in respect of a parcel valued at $7,100. But the fees for registering two other parcels valued at $20,000, and another valued at $50,000, were only $6.50. The fees, we presume, vary with the circumstances of each case. Those in which the title is short and free from difficulty involve a very trifling outlay, while those where the title is more involved necessitate a larger expenditure.

On the whole, we think the public is to be congratulated on the low average of office fees required on a first registration. According to the table this appears to be, on fifty-eight applications, and property valued at $922,680, only 15½ mills in the dollar.

CONSTITUTIONAL LAW IN THE UNITED STATES.

"The Unwritten Constitution of the United States" is an attractive title for a book, and we took up Mr. C. G. Tiedeman's recent work with a good deal of interest. Mr. Dicey, in his lectures on the law of the constitution, has done much to make our ideas clear upon the subject of written and unwritten constitutional law, as well as many other things. Unwritten constitutional law is not law strictly so-called at all, it is convention; what may be called constitutional morality. In Mr. Tiedeman's book, therefore, we expected to find much interesting information on conventions of the American constitution, of the same character as those which govern with us such matters as when an adverse vote calls for a resignation of a ministry, the precise limits of the resistance to the popular house which it is open to the second chamber to exercise, and so on. We are compelled to say—after two careful perusals—that Mr. Tiedeman's book is something like a once famous lecture of the late Artemus Ward, entitled "The Babes in the Wood," wherein he was wont to discourse on many and various matters, but declined to make any remarks upon the unfortunate babes, because he said he was sure his audience knew much more about them than he did. Almost, if not quite, the only chapters in Mr. Tiedeman's book which really deal with unwritten constitution seem to be those on the Electoral College, and the re-eligibility of the President. The conventional rule which grew up so early in American constitutional history, that the presidential electors were not entitled to exercise any discretion of their own in the choice of a President, though undoubtedly the intention of the written constitution was that they should do so, does seem to us to fairly come within what are known as unwritten constitutional rules, and so, certainly, does the rule (so far as it really exists) that no man shall have more than two terms of office as President.

There seems to us a good deal of confusion of thought in this little book, though in many ways its chapters are interesting. Wherever by virtue of judicial decisions, or otherwise, a departure from the literary theory of their written constitution has established itself among the Americans, the author claims that as part of the unwritten constitution. For example, in the chapter on the inviolability of corporate charters and of charter rights, Mr. Tiedeman deals with the interpretation placed by the courts upon that clause of the constitution which provides that "No State shall pass any law * * impairing the obligation of a contract," commencing with the Dartmouth College case onwards. But the decisions of the courts on constitutional points, recorded and referred to thereafter as precedents, form part of the written constitutional as much as any statute or fundamental document. It certainly is most strange to

see decisions of the judges treated as unwritten law. Again, we think a study of Professor Dicey's lectures would have prevented this confusion of terms.

If Mr. Tiedeman had been content with the alternative title to his work given on his title page, viz., "A Philosophical Inquiry into the Fundamentals of American Constitutional Law," it would, we think, have designated more accurately the actual contents of the book than the title which he places more prominently forward. It certainly more correctly designates the contents of the interesting chapter on the origin and development of constitutional law, in which the development of the American constitutions, Federal and State, is traced out, and that on the doctrine of natural rights in American constitutional law.

The chapter on the constitution in the war of secession explains how the President successfully resisted writs of *habeas corpus* issued by the proper tribunals during the time of the war, taking upon himself to substitute martial law for civil law, and says our writer: "Even though there be an inexplicable contradiction between the practices of military rule and the express limitation of the written constitution, the rule which is actually enforced in time of war is the true constitutional rule, and not that which in time of peace the Supreme Court of the United States declares to be the proper rule." This seems to us a very anarchical doctrine, and to rest upon a confusion of thought, but it well illustrates a main idea of the writer of this work. Mr. Tiedeman is full of the idea, no doubt perfectly true in a certain sense, that constitutional law, as in fact all other law, is "the resultant of all the social and other forces which go to make up the civilization of the people." But Mr. Tiedeman is apparently not willing to wait until this resultant has taken the form of a properly constituted enactment or law in the ordinarily accepted meaning of the word. In the first chapter he quarrels with Austin's definition of a law, as "a rule of conduct prescribed by the supreme power of the State." We confess we are on the side of Mr. Austin. This, says Mr. Tiedeman, has led to the general adoption, "as an axiomatic truth, of a most serious error concerning the origin and development of municipal law." But Austin is not speaking of the origin and development of municipal law; he is speaking of what municipal law is after it has been originated and developed. Mr. Tiedeman prefers to say that a legal rule is "the product of social forces reflecting the prevalent sense of right" (p. 9). Would the Austin school of jurists, he asks triumphantly, "claim that there was no law on the borders of American civilization, where the only government is the vigilance committee, and where the only court of justice is presided over by Judge Lynch?" We fear that Mr. Tiedeman does not distinguish clearly between morality and law. There is a morality in such a community, and by vigilance committees, White Caps, *et hoc genus omne*, that morality may be very forcibly imposed upon recalcitrants; but the rules of this morality are not rules of law, because they are not enactments of any permanently constituted body in whom authority has been vested by or on behalf of the community to make such rules and impose them on the people. Where there is no constituted authority, there can be no law, properly so-called.

COMMENTS ON CURRENT ENGLISH DECISIONS.

The Law Reports for June comprise (1891) 1 Q.B., pp. 669-799, and (1891) 2 Ch., pp. 1-185.

HUSBAND AND WIFE—AUTHORITY OF HUSBAND TO DEPRIVE WIFE OF LIBERTY—REFUSAL OF WIFE TO LIVE WITH HUSBAND.

The Queen v. *Jackson* (1891), 1 Q.B. 671, is the now celebrated case in which the right of a husband to seize his wife and detain her in his custody was discussed by the Court of Appeal (Lord Halsbury, L.C., Lord Esher, M.R., and Fry, L.J.). The facts of the case were that the husband and wife were married in 1887, and within five days afterwards the husband went to New Zealand, it then being intended that the wife would follow him as soon as he got settled. During his absence the wife went to live with her sisters and brother-in-law. She wrote to her husband to return to England, which he did, but on his return she refused to live with him. He obtained a decree for the restitution of conjugal rights in the Matrimonial Court, which she refused to obey. The husband then took two other men and seized his wife on a Sunday as she came out of church, and carried her off in a carriage to his own house, where he detained her. A writ of *habeas corpus* was granted at the instance of the wife directed to the husband, whose return to the writ embodied the above facts, and was held to be no answer in law, and the wife was ordered to be set at liberty. The *dicta* in the books as to the power of a husband over the person of his wife, which lay down that a husband may not only confine his wife in custody, but also administer corporal castigation, were denied to be a correct statement of the law, and the result of this decision would appear to be that a husband who desires to retain the society of his wife must rely on moral suasion, and that the law will not uphold him in any physical restraint of her person, or in the infliction of any corporal chastisement. The case has raised a good deal of discussion, some apparently thinking the proper and necessary authority of the husband over his wife is undermined and destroyed; but where a wife's society can only be secured by the exercise of such acts as Mr. Jackson found necessary to adopt, we do not think many husbands will think her society is worth having at all. Where husband and wife cannot live together except on the terms of the husband becoming the wife's gaoler, it is evident that matters have reached such a point that it is better for them to live apart, and it would not be desirable that the law should sanction any compulsory action on the part of the husband to constrain his wife to live with him against her will. The paucity of actual authority to be found in the books on the subject is pretty conclusive evidence that moral and not legal suasion has been sufficient in the past to maintain the marital relationship, and those who are alarmed at this decision have not much foundation for their fears.

ELECTION—STATUTE MAKING ELECTION VALID—VOID ELECTION—DISQUALIFIED PERSON ACTING—PENALTY FOR ACTING WHEN DISQUALIFIED.

De Souza v. *Cobden* (1891), 1 Q.B. 687, is a sort of sequel to *Hope* v. *Sandhurst*, 23 Q.B.D. 79, in which it was decided that women are not eligible for election

under the Municipal Corporations Act of 1882. By s. 41 of that Act a person acting without being qualified is liable to a fine not exceeding £50 for each offence, and by s. 73 the Act provides that every election under the Act not called in question within twelve months after the election is to be deemed to have been to all intents a good and valid election. The defendant, a lady, was elected as a member of the council, no proceedings were taken within the twelve months to set aside the election, and after the lapse of the twelve months the defendant acted and voted on five occasions as a member of the council. The action was brought to recover the penalties for so acting. The Court of Appeal (Lord Coleridge, C.J., Lord Esher, M.R., and Fry, L.J.), affirming the decision of Day, J., determined that s. 41 did not apply to elections of persons who were absolutely disqualified, but only to elections which possibly might be good, and that therefore it would not relieve a disqualified person from liability to the penalty under s. 41.

STATUTE—CONSTRUCTION OF STATUTE—RETROSPECTIVE EFFECT OF STATUTE.

In re Williams & Stepney (1891), 1 Q.B. 700, is a case upon the construction of a statute, in which the point was whether or not it was retrospective in its operation. By the Arbitration Act, 1889 (52 & 53 Vict., c. 49), s. 2, "a submission, unless a contrary intention is expressed therein, shall be deemed to include the provisions set forth in the first schedule to the Act," one of which is "that the costs of the reference and award shall be in the discretion of the arbitrators or umpire," and by s. 25, the Act "shall apply to any arbitration commenced after the commencement of this Act under an agreement or order made before the commencement of the Act" (*i.e.*, before 1st January, 1890). The arbitration in this case was held after 1st January, 1890, under an agreement made before that date, which did not give power to award costs. The arbitrators nevertheless, acting under the Act, awarded costs. The Divisional Court (Mathew and Day, JJ.) were of opinion that s. 2 did not apply to submissions made before the Act, and that s. 25 merely applied to arbitrations under agreements made before the Act, to those provisions of the Act relating to the conduct of an arbitration, but could not be held to alter the contract of parties without their consent.

LANDLORD AND TENANT—FORCIBLE ENTRY—REMOVING ROOF OF HOUSE—INJURY BY LANDLORD TO TENANT'S FURNITURE—TRESPASS.

In *Jones* v. *Foley* (1891), 1 Q.B. 730, the plaintiff was tenant to the defendant of a cottage, and on the expiration of his tenancy had wrongfully refused to give up possession. The defendant was desirous of rebuilding the cottage, and while the plaintiff was still in occupation the defendant's workmen set to work without any personal violence to remove the roof, and in so doing portions of the roof fell on the plaintiff's furniture and injured it. The action was brought to recover damages for the injury to the furniture. The plaintiff had applied to justices for a warrant under the provisions of a statute, directed to a constable to give defendant possession after the expiration of twenty-one days from the date of the warrant. The twenty-one days had not expired when the proceedings to re-

move the roof were begun. The plaintiff contended that the removal of the roof under the circumstances amounted to a forcible entry, and that until the twenty-one days had expired his possession could not be interfered with. Day and Lawrance, JJ., however, held that the plaintiff had no cause of action, and that the issue of the warrant did not extend the rights of the tenant nor limit those of the lessor. The plaintiff was a trespasser, and the injury done to his furniture was not due to the defendant's act, but to his own obstinacy.

PRACTICE—APPEAL—ORDER, WHETHER INTERLOCUTORY OR FINAL—POINT OF LAW RAISED BY PLEADINGS—ORDER DISMISSING ACTION.

In *Salaman* v. *Warner* (1891), 1 Q.B. 734, a point of law had been raised by the pleadings which had been submitted to the adjudication of the Court, and the result was that the point was determined in favor of the defendant, and the action was consequently dismissed. On an appeal being brought, a preliminary objection was taken that the order of dismissal was a final and not an interlocutory one, and therefore the notice of appeal was insufficient. The Court of Appeal (Lord Esher, M.R., and Fry and Lopes, L.JJ.) overruled the objection. The rule which the Court lays down for deciding whether an order is "final" or "interlocutory" is a somewhat artificial one. It is this: If the decision is one which, whichever way it is given, will finally dispose of the action, it is "final"; if, on the other hand, the decision if given in one way would not finally dispose of the matter in litigation, then it is "interlocutory." In the present case the decision, if it had been given in favor of the plaintiff, would not have finally determined the matter in litigation; therefore the order was "interlocutory," and the objection was overruled.

In ordinary parlance an interlocutory order is generally understood to be an order made on some proceeding arising in the course of an action, and not finally disposing of the action itself. But an order which dismisses the action on a point of law would be generally considered, we think, about as final as it well could be, inasmuch as it would be a bar to any other action for the same cause. From this decision, however, it would appear that this opinion is not well founded.

ASSIGNMENT OF DEBT—ASSIGNEE OF DEBT, RIGHT OF, TO SUE—TRUST IN RESPECT OF MONEYS RECOVERED—JUDICATURE ACT, 1873 (36 & 37 VICT., C. 66), S. 25, S-S. 6—(R.S.O., C. 122, S. 7).

In *Comfort* v. *Betts* (1891), 1 Q.B. 737, the Court of Appeal (Lord Esher, M.R., and Fry and Lopes, L.JJ.) decided that an assignment of a chose in action may be absolute so as to entitle the assignee to sue for its recovery in his own name, under the aforementioned provisions of the Judicature Act (see R.S.O., c. 122, s. 7), notwithstanding there is a trust declared of the proceeds of such chose in action in favor of the assignor and others. In the present case the assignment was made by a number of creditors of the defendant, whereby they assigned their debts absolutely to the plaintiff, on trust out of the proceeds to pay the assignors such proportionate part thereof as should represent the amount of the debt due to them respectively, or such part thereof as might be recovered; and it was held the plaintiff was entitled to sue in his own name.

SHIP—CHARTER PARTY—ADVANCE FREIGHT TO BE PAID, "IF REQUIRED"—DEMAND OF ADVANCE FREIGHT AFTER LOSS OF CARGO—LIABILITY OF CHARTERER.

In *Smith* v. *Pyman* (1891), 1 Q.B. 742, the Court of Appeal (Lord Esher, M.R., and Fry, L.J.) determined that under a charter party entitling the ship-owner to advance freight, "if required," the ship-owner is not entitled to demand advance freight after the vessel is wrecked and the cargo lost.

CRIMINAL LAW—BREACH OF STATUTORY DUTY, WHEN INDICTABLE—REMEDY FOR OFFENCE CREATED BY STATUTE.

The Queen v. *Hall* (1891), 1 Q.B. 747, was an indictment for breach of a duty imposed by statute on the defendant, and a motion was made to quash the indictment on the ground that the statute having imposed a penalty for breach of its provisions, and the offence not having been previous to the statute an offence at common law, no indictment would lie; and after an elaborate review of the authorities, Charles, J., so held, and quashed the indictment. Where a statute, however, imposes an additional remedy for an offence which was previously indictable at common law, there the remedies are cumulative.

STATUTE—CONSTRUCTION.

In *Kennedy* v. *Cowie* (1891), 1 Q.B. 771, a question as to the proper construction of a statute was determined by Day and Lawrance, JJ. The statute in question, which was the Conspiracy and Protection of Property Act, 1875, enacts that it shall not apply to seamen; and the question was whether an offence against a seaman was excluded from the Act by this section; and it was held that, although seamen could not be punished for an offence under it, yet an offence against a seaman was not excluded from the provisions of the Act.

CLAIM AND COUNTER-CLAIM—COSTS—LIEN—SOLICITOR, LIEN OF—MONEY PAID INTO COURT.

In *Westacott* v. *Bevan* (1891), 1 Q.B. 774, the plaintiff claimed £742 for work; the defendants paid £500 into court, with a denial of liability, and also counter-claimed for damages for the plaintiff's delay in completing the work. The plaintiff proceeded with the action, and £426 was found due to him on his claim; and £200 to the defendants on their counter-claim. The plaintiff's solicitor, under a statute of which we have no counterpart in Ontario, claimed a charge on the £500 paid into court for his costs, as being money "recovered or preserved" through his instrumentality; but the Court (Wills and Vaughan Williams, JJ.) were of opinion that although under the English acts the plaintiff might have taken the £500 out of court and abandoned the residue of his claim, yet, as he had not done so, his solicitor, under whose advice he proceeded with the action, could not be said to have "recovered or preserved" the £500, but rather the reverse. It was also argued that at any rate the claim and counter-claim were distinct actions, and therefore the plaintiff's solicitor was entitled to a charge on the £465 recovered on the claim; but the court came to the conclusion that a claim and counter-claim are not for all purposes distinct actions; and here, as the claim and counter-claim arose out of the same transaction, it was only the ultimate balance, after deducting the counter-claim, which could be said to have

been recovered or preserved by the solicitor's exertions. The Chancery Divisional Court at its recent sittings, we believe, came to a similar conclusion in the case of *Flett* v. *Way*.

CONTRACT—JOINT CONTRACTORS—MARRIED WOMAN A JOINT-CONTRACTOR—JUDGMENT AGAINST ONE JOINT-CONTRACTOR—RES JUDICATA.

In *Hoare* v. *Niblett* (1891), 1 Q.B. 781, an attempt was made to establish an exception from the general rule, that a judgment against one of two or more joint-contractors discharges the rest in the case where one of the joint-contractors was a married woman, contracting in respect of her separate property; but the Court (A. L. Smith and Grantham, JJ.) decided that the exception could not be maintained.

BANK OF ENGLAND—MANDAMUS—LIST OF STOCK TRANSFERRED TO NATIONAL DEBT COMMISSIONERS—INSPECTION BY PERSON WITHOUT INTEREST.

In *The Queen* v. *Bank of England* (1891), 1 Q.B. 785, an application was made for a mandamus to compel the Bank of England to permit the applicant to inspect a list of unclaimed stock, transferred under Act of Parliament to the National Debt Commissioners. The applicant claimed no personal interest in any stock so transferred, but desired to obtain information for the purpose of his business, which was that of a "next of kin and unclaimed money agent." According to the statute directing the transfer, the bank were required to keep a list of stock so transferred, which list is to be "open for inspection at the usual hours of transfer." The Court (A. L. Smith and Grantham, JJ.) refused the application, being of opinion that as the applicant had no *bonâ fide* interest in any stock transferred, he had no right to claim to inspect the list; and the motion was therefore refused. It appears from this case that no stock is transferred by the bank until every reasonable effort has been made to find the owner; and that the lists published by agents, to a large extent, refer to stock which has long since found claimants.

STATUTE—CONSTRUCTION.

Fletcher v. *Fields* (1891), 1 Q.B. 790, was a case stated by justices, the point of law involved arising on the construction of a statute prohibiting the loading or unloading of "coal" on or across a footway between certain hours, and imposing a penalty for breach of its provisions. The question was, whether "coke" was included in the term "coal." A. L. Smith and Grantham, JJ., held that the statute being a restriction of the liberty of the subject was not to be extended beyond its precise terms.

WILL—TRUST FOR IMPROVEMENT OF LANDED ESTATE—ACCUMULATION—THELLUSSON ACT (39 & 40 GEO. 3, C. 98)—(52 VICT., C. 10, S. 2).

In *Vine* v. *Raleigh* (1891), 2 Ch. 13, the question arose as to the effect of the will of a testator, which directed that his residuary estate should be laid out in the purchase of a landed estate, and out of the income thereof that an annuity should be paid to his nephew for life, and that the surplus income should, during the life of the nephew, be expended in the purchase of additional land "or in the

improvement of the landed estate, and in maintaining in good habitable repair the houses and tenements on the property." It was conceded that so far as the direction to invest the surplus income in the purchase of additional land was concerned it was a direction to accumulate, and would be within the Thellusson Act, and could not extend beyond the period of twenty-one years from the testator's death. It was, however, contended that the direction to apply the surplus in improvements and repairs was also an attempt to accumulate and could not extend beyond the twenty-one years. Chitty, J., held that the latter direction did not fall within the statute, and on appeal his decision was affirmed: but the Court of Appeal (Lindley, Lopes and Kay, L.JJ.) added a declaration that the application of the income to purposes the expense of which ought to be defrayed out of capital was not authorized by the will. The Court of Appeal were of opinion that all improvements in substance which could in any fair sense be regarded as coming under the words "maintaining in good habitable repair the houses and tenements on the property" are outside the Thellusson Act altogether. But building houses on the land would be within the Act.

MANDATORY INTERIM INJUNCTION—ERECTION OF BUILDINGS AFTER NOTICE OF MOTION FOR INJUNCTION—ATTEMPT TO ANTICIPATE INJUNCTION.

Daniel v. *Ferguson* (1891), 2 Ch. 27, shows that a defendant who attempts to anticipate an injunction by proceeding with the erection of a building objected to by the plaintiff, after notice of the plaintiff's motion for an interim injunction, does so at his own risk; and if he turns out to be in the wrong, the court will not only restrain him by an interlocutory injunction from further proceeding with the building, but will also compel him to remove that part of the erection made after notice of the plaintiff's motion was served. The order of Stirling, J., so directing was affirmed, on appeal, by Lindley and Kay, L.JJ.

PRACTICE—ACTION AGAINST FIRM—PARTNERS RESIDENT OUT OF JURISDICTION—JURISDICTION—AMENDMENT OF WRIT—SERVICE OUT OF JURISDICTION—RULE 64 (ONT. RULE 271).

In *Indigo Co.* v. *Ogilvy* (1891), 2 Ch. 31, the effect of the rules allowing a partnership to be sued in the firm name again came up for consideration. The facts of the case were somewhat involved, but may be briefly stated as follows: The plaintiffs were an English firm, and had entered into contracts with Gillanders & Co., an Indian firm, for the manufacture and purchase of indigo. Ogilvy & Co. were the English correspondents of Gillanders & Co., and there were some partners common to both firms, and some of the partners were resident in India. Gillanders & Co. consigned indigo to Ogilvy & Co., and the action was commenced by the plaintiffs against Ogilvy & Co., in the firm name, claiming the indigo; and all the members of the firm, both those in England and those in India, appeared. The plaintiffs then obtained an *ex parte* order to amend their writ by adding Gillanders & Co. as defendants, and making consequential alterations in the writ, and also obtained leave to serve the amended writ out of the jurisdiction. Under this order they amended the writ by adding Gillanders & Co. by the firm name as defendants, and also amended the claim indorsed on the

writ by adding a claim in respect of breaches of two agreements made between the plaintiffs and Gillanders & Co., which were not included in the original writ. On motion of Gillanders & Co., North, J., set aside the order to amend as irregular. On appeal, the Court of Appeal (Lindley and Kay, L.JJ.) held (1) that as the firm of Ogilvy & Co. was composed of partners resident out of the jurisdiction, the writ originally issued was irregular and could not properly have issued as against such partners without leave; (2) that for the like reason Gillanders & Co. could not be added as defendants by amendment. They therefore, though dismissing the appeal, directed that the plaintiffs should be at liberty to amend the writ by substituting for the names of the two firms the names of the several partners thereof residing in England, with liberty to the partners who resided abroad to withdraw their appearances, but without prejudice to the plaintiffs' applying for leave to join as defendants all or any of those members of the two firms who resided in India. It would therefore appear from this decision that where any members of a firm are resident abroad, the firm cannot properly be sued in the firm name. See also *Western National Bank of N.Y.* v. *Perez* 64 L.T.N.S. 542.

Notes on Exchanges and Legal Scrap Book.

SIGNATURE TO A WILL.—A prominent and wealthy citizen in a New Jersey town was dying in his bed. His will, hastily drawn, was placed before him, and a pen put into his hand with which to make the signature of his name or subscription mark upon the paper. He was asked if it was his will, and assented. He made an effort to write. One stroke was accomplished, when his head sank upon the pillow, the pen dropped from his hand, and his heart ceased to beat. He was dead in the sight of the witnesses. This was in New Jersey, and the point, whether or not the will was executed, is for the courts of that State to decide. In some States the case would be a very doubtful one. It might depend upon the point whether the single stroke of the pen actually made was the "subscription" which the deceased intended to make, whether he had completed the subscription of the will when death palsied his hand.—*The Central Law Journal.*

DEATH PENALTY FOR TRAIN-WRECKERS.—In connection with the recent attack by brigands upon a railway train in Turkey, when by something like a miracle no serious bodily harm was received, it is interesting to note that the State Legislature of California has passed a law enacting that convicted train-wreckers shall in future be punished with death. "Only those who are conscientiously opposed to capital punishment in any case," says the *Railway World*, "can make any logical objection to such a statute. The average murderer slays but one; the train-wrecker may kill a hundred. Many who are called murderers perhaps never intended to deal a fatal blow. In countless instances the homicide has been committed under a sudden impulse or under ter-

rible provocation. But the man who stealthily watches his chance, and who contrives, with the precision of a clock-maker and the cruelty of a fiend, to so adjust obstructions as to imperil the lives of scores of human beings, is a monster of depravity. Rarely, indeed, is there any clumsiness in the arrangement. Every detail is regulated with scientific accuracy. In the small hours, when the chance of detection is only as one in a thousand, does the train-wrecker do his work."—*Law Journal.*

SURETYSHIP FOR INFANTS.—A recent decision of the Recorder of London in the Lord Mayor's Court seems to have occasioned considerable consternation among the numerous traders who lay themselves out for doing business with minors; and indeed, before *Peach* v. *Makins*, the case in question, there appears to be no authoritative judicial determination reported of a legal crux which must have frequently occurred. The plaintiff sold a bicycle to an infant on what is familiarly known as the hire system; that is, under a contract that the minor should pay for the machine by certain periodical instalments, and that in default of the payment of any one of these instalments the whole of the purchase money should become forthwith payable to the vendor. These payments by the minor were guaranteed by a person of full age, who undertook, by a clause in the contract, to discharge the liabilities of the minor in case the latter made default. The minor having made default, the action was brought by the vendor against the guarantor, as surety for the minor. In answer to the plaintiff's claim the defence was successfully set up that, inasmuch as no debt existed or could legally exist between the plaintiff and the minor, the defendant guaranteed nothing, and reliance was placed on the dicta of Lord Selborne in *Lakeman* v. *Mountstephen* (30 L. T. Rep. N. S. 437; L. Rep. 7 H. of L., p. 24): "There can be no suretyship unless there be a principal debtor . . . and until there is a principal debtor there can be no suretyship. Nor can a man guarantee anybody else's debt unless there is a debt of some other person to be guaranteed." Acting upon this exposition of the law, the Recorder, no question of fact being in dispute, entered a verdict for the defendant.—*Law Times.*

THE IMPUNITY OF PERJURY.—Some time ago we dwelt at length on the wide prevalence of perjury, and on the almost complete impunity with which it can be practised. The writer who recently furnished to one of the magazines a humorous article on "The Decline of Lying" was miserably unacquainted with the law courts of his country. Prosecutions for perjury are scarcely known; convictions are still rarer, if that be possible. Nothing is easier than lying; and lying on oath is not perceptibly less easy than lying informally, as, for example, on a tombstone. Unless a man lie right in the face of documents or patent facts, he may invent his own evidence with perfect safety and literary effect. And even if he should run against an awkward obstacle of the kind, it is always open to him to *explain*. Direct proof of perjury is extremely difficult to find. Without direct poof, apparently, prosecutors do not care to venture on a charge.

Nor need this cause wonder; for stupid men, and hasty men, and simple men are so rife in the world that there always lurks just a faint possibility of convicting an innocent person. The Attorney-General was asked in the House of Commons, the other day, whether he would call the attention of the Public Prosecutor to the case of *Evelyn* v. *Hurlbert*, with a view to seeing whether sufficient evidence existed on which to base a prosecution of one or other of the parties to the suit for perjury; and in reply he said that there must be the most careful investigation as to whether any or either of them can be convicted of that crime. A sensational case has thus its uses in bringing into prominence ugly features which are by no means less common in obscure and humdrum actions. We again repeat our humble opinion, that prosecutors ought to be a little more courageous in cases of perjury. Skilled witnesses, of course, we can never hope to reach by a charge of this kind. A skilled witness of experience never commits perjury. His is an innominate offence. But there ought to be some *nomen juris* invented to cover the practice of maintaining that the laws of nature and of logic are by no means uniform in their operation, and that science says black or says white according as the pursuer or defender has cited you.—*Journal of Jurisprudence.*

A Dog Attempting an Alibi.—A writer in *Rod and Gun* relates the following incident of the "friend of man": "While staying in Devonshire last week at a farm, I had a practical illustration of an interesting case of sheep-worrying. Looking out of my bedroom window just as it was daylight, I saw a flock of ewes that had recently lambed tearing about the field as if alarmed; and I quickly discovered that two dogs were hunting them. I woke up the farmer, and we were soon on the spot; but the dogs were too quick for us, and we could only identify one of them, which we recognized as belonging to a farm about three miles off. They had killed and partially eaten two lambs, and seriously mauled three others. My friend at once got out his gig; and we drove off to the farm from whence we thought the culprit hailed, expecting to reach there before the dog. On arriving, we told the owner of the animal our errand, and he at once invited us to come and see his sheep-dog, which could not possibly have committed the crime, as he was shut up of a night in the stable. There, truly enough, did we find the collie, looking half asleep and curled up in a corner among the straw. His owner triumphantly pointed him out; but he was a peculiarly marked dog, and we had both spotted him, and, moreover, there was a broken window in the stable, and traces of dirty, and apparently recent, claw-marks on the wall. My farmer looked in the brute's mouth, and thought there was wool on the teeth; but the owner contended that that proved nothing, as the dog had been among his own sheep the previous evening. I then suggested that a dose of salt and water might prove if any mutton had been recently devoured; and, the two farmers consenting to this, we dosed poor collie accordingly, and in a few minutes he disgorged a quantity of raw lamb with the wool on it, unmistakably recently killed. The case was admitted proved, and the neighbors speedily came to terms as to the question of damage.

To me it seemed a most interesting case of canine intelligence that two scamps of dogs, one we know having sheep within a few yards of him, should not attempt any sport on their own ground; but should deliberately meet some miles off, and then, when interrupted, tear off to their homes, and, like a human criminal, endeavor to prove an *alibi* by being found asleep in bed about the time when the murder was committed."

NEGLIGENCE OF VALUERS.—Valuers who are negligent with the business of their clients will find little to comfort them in the decision of the Court of Appeal in *Scholes* v. *Brook* (noted in 91 L.T. 77), upon which we commented in a recent article upon "The Liability of Valuers." The decision of Mr. Justice Romer in the court of first instance (63 L.T. Rep. N.S. 837) has been affirmed, and our summary of the law concerning valuations remains correct. A mortgagee may be either (*a*) a stranger to, or (*b*) a client of, the valuer. If (*a*) he is a stranger, his action against the valuer can only succeed as an ordinary action of deceit, in which he is now, thanks to *Derry* v. *Peek* in the House of Lords (61 L.T. Rep. N.S. 265; 14 App. Cas. 337), compelled to allege and prove fraud, fraud being the essence of the action. If, on the other hand, (*b*) the mortgagee is a client of the valuer's—albeit the valuer is to be paid by the mortgagor out of the money advanced or otherwise—if there is a "contractual relation" between the valuer and the proposed mortgagee, and the valuer knows that he is valuing the property in the interest of the proposed mortgagee, then all that the mortgagee has to prove as plaintiff is that the valuer did not use reasonable skill and care in preparing the valuation. This proved, the valuer is liable in damages; this non-proven or disproved, he escapes. But Mr. Justice Romer and the Court of Appeal have now held that in *Scholes* v. *Brook* there was a contractual relation between the plaintiff and the valuers, that the valuers were guilty of negligence, and were legally responsible for the damages caused by that negligence. Mortgagees can no longer rely upon the decision of Mr. Justice Chitty in *Cann* v. *Wilson* (59 L.T. Rep. N.S. 723; 39 Ch. Div. 39), the first case in which negligent valuers were hit, for that decision was anterior to *Derry* v. *Peek*. But if they can show a contractual relation between themselves and the valuers, they can lean without distrust upon *Scholes* v. *Brook*, unless—which is very unlikely—that case should go to the House of Lords and be decided differently there.—*Law Times.*

ABOUT WITNESSES.—The strange statements, extraordinary admissions, prompt retorts, funny mistakes, crooked answers, and odd distortions of the Queen's English, heard in the courts, would make a plethoric volume of amusing reading. From an old English magazine we gather the following anecdotes of witnesses, some of which, we trust, will prove new to the readers of the *Green Bag*.

The subjects of legal vivisection do not find the process so agreeable to themselves as it is interesting to uninterested listeners. The old fellow who had

"married three wives and buried them lawful" would probably have preferred keeping to himself the fact that a buxom laundress declined to make him a happy man for the fourth time in his life because he was not prepared to take her to church in a basket-carriage drawn by six donkeys.

The witness-box is prolific in malapropisms. The man whose friend could not appear in court by reason of his being just then superannuated with drink; the Irish woman whose husband had often struck her with impunity, although he usually employed his fist; the gentleman who found a lady in the arms of Mopus; and the Chicago dame, who indignantly wanted to know who was telling the story when the judge suggested that when she spoke of the existence of a family fuel she must mean family feud—might one and all claim kindred with Sheridan's deranger of epithets. Nor could Dogberry himself have shown to greater advantage than a police-officer, when, upon the stand in New York court, he related how one Nelson had punched him twice in the head and scratched his face without aggravating him to use his club, because it went against his feelings to mistreat a human being; winding up what he termed his "concise-ful" narration with: "I am willing to be let upon, your honor, but not alto-gether. The law must be dedicated; give him justice tampered with mercy."

The London policeman who found arrears of fat upon the blouses of two men suspected of purloining from a butcher would have smiled in scornful superiority to hear the Glasgow constable deposing that a riotous Irishman "came off the Bristol boat wi' the rest o' the cattle, and was making a crowd on the quay, offering to ficht him or any ither mon." "Well," asked the baillie, "did he stand on his defence when you told him to move on." "No, your honor, he stood on the quay." Were members of the force always so exact, the magistrate who asked a street Arab, before putting him on his oath, what was done to people who swore falsely, would not have had his ears shocked with the reply, "They makes policemen out of 'em."

Euphemisms are wasted upon lawyers, since they will insist upon having their equivalents. Said one witness: "He resorted to an ingenious use of circum-stantial evidence." "And pray, sir, what are we to understand by that?" inquired the counsel. "That he lied," was the reply of the witness, whose original state-ment was worthy of the doctor who testified that the victim of an assault had sustained a contusion of the integuments under the orbit, with extravasation of blood and ecchymosis of the surrounding tissue, with abrasion of the cuticle—meaning simply that the sufferer had a black eye. Another witness testified that the plaintiff's character was "slightly matrimonial." Being called upon to ex-plain, he answered, "She has been married seven times."

In a trial at Winchester a witness failing to make his version of a conversa-tion intelligible by reason of his fondness for "says I" and "says he," was taken in hand by Baron Martin, with the following result: "My man, tell us now exactly what passed." "Yes, my lord. I said I would not have the pig." "And what was his answer?" "He said he had been keeping it for me, and that he—" "No, no; he could not have said that; he spoke in the first person." "No, my lord; I was the first person that spoke." "I mean, don't bring in

the third person; repeat his exact words." "There was no third person, my lord—only him and me." "My good fellow, he did not say he had been keeping the pig; he said, '*I* have been keeping it.'" "I assure you, my lord, there was no mention of your lordship at all. We are on different stories. There was no third person there; and if anything had been said about your lordship, I must have heard it." The Baron gave in.

A Jew, speaking of a young man as his son-in-law, was accused of misleading the court, since the young man was really his son. Moses, however, persisted that the name he put to the relationship was the right one, and, addressing the Bench, said, "I was in Amsterdam two years and three quarters; when I comes home I finds this lad. Now the law obliges me to maintain him, and consequently he is my son-in-law."

"Well," said Lord Mansfield, "that is the best definition of a son-in-law I ever yet heard."

A most inexcusable want of recollection was displayed by a benedict, who thought he had been married only three years, while he had not the faintest notion when or where he made his wife's acquaintance. A woman never pretends to ignorance on such matters, oblivious as she may be regarding the number of birthdays she has seen. Forgetting that a woman should be at least as old as she looks, a lady told a Paris magistrate she was twenty-five. As she stepped out of the box, a young man stepped in, who owned to twenty-seven. "Are you related to the previous witness?" he was asked. "Yes," said he, "I am her son." "Ah!" murmured the magistrate, "your mother must have married very young." The inquiry as to age was met by an Aberdeen spinster with a protest against an unmarried woman being expected to enlighten the public on such a subject. Finding that of no avail, she admitted she was fifty, and, after a little pressure, owned to sixty. Counsel then presumed to inquire if she had any hopes of getting a husband, and was rebuffed for the impertinence with: "Weel, sir, I winna tell a lee; I hinna lost hope yet, but I wudna marry you, for I am sick o' your palaver."

An examiner's perseverance is not always successful in eliciting the desired answer. "Was there anything in the glass?" asked a counsel of a somewhat reluctant witness. "Well, there was something in it," he replied. "Ah! I thought we should get at it in time," observed the triumphant questioner. "Now, my good fellow, tell us what that something was." The good fellow took time to think over it; at last he drawled out, "It was a spoon." Equally unsatisfactory from a legal point of view was the following short dialogue: "You have property, you say; did you make it yourself?" "Partly." "Are you married?" "Yes." "Did your wife bring you anything?" "Yes." "What?" "Three children." The witness had the best of that bout. The information imparted was as little to the purpose as the answer to the question: "When you called upon Mr. Roberts, what did he say?" propounded to a voter before an election committee. Before the man could open his mouth to reply, the question was objected to. For half an hour counsel argued the matter; then the room was cleared that the committee might consider the subject. After the lapse of

another half-hour the doors were opened, and the chairman announced that the question might be put. All ears were strained to catch the impending disclosure. But the mountain did not bring forth even a mouse. "What did Mr. Roberts say?" asked the counsel; and the witness replied: "He wasn't at home, sir; so I didn't see him."—*Green Bag.*

COSTS AGAINST COMPANIES.—Intimately connected with the questions recently discussed in this journal, in the course of an article entitled, "Solicitors and Company Promotion," there is a further question as to the circumstances in which a solicitor, who renders services in the promotion of a company, can claim payment of his costs by the company after registration. It becomes necessary to consider in such cases whether the solicitor has agreed to look to the company, on the company's authority, for payment of his charges; or whether he must rely on the promoters, upon whose retainer he has, in fact, acted. It is said, indeed, that the promoter, even though there be no express contract, is entitled to compensation out of the funds of the company for his preliminary services, provided the company can fairly be held to have adopted and derived benefit from such services. But this proposition, which can only be allowed with some reserve, gives the promoter's solicitor no direct remedy against the company; indeed, no such remedy arises even when the company have expressly agreed with the promoter to pay the solicitor's charges (see *Re Hereford, etc., Waggon Company*, 35 L.T. Rep. N.S. 40; and *Re Empress Engineering Company*, 43 L.T. Rep. N.S. 742). Of more explicit effect, however, is the decision of Cotton, Lindley, and Fry, L.JJ., in *Re Rotherham Alum and Chemical Company* (50 L.T. Rep. N.S. 219). There M., a promoter *pro hac vice*, employed P. as his solicitor in the formation of a company to take over M.'s business. The articles provided that all expenses incurred in and about the formation of the company should be paid by the company. After the incorporation of the company, P. acted as its solicitor, and M. officiated as one of the directors. Both were present at a meeting of the first directors, when P. asked for payment of his costs connected with the formation of the company, and when a conversation ensued tending to show that the company would pay them, but nothing to that effect was recorded on the minutes. At a subsequent meeting a resolution was proposed by M. and passed, that a cheque for £39 4s. 6d. should be given to P. in discharge of a certain part of the costs; that is to say, for the actual amount which the solicitor had had to pay to the printers of the memorandum and articles of association. Nothing more was paid, and the company presently was wound up under a compulsory order. The solicitor then carried in his bill of costs, but the taxing master, to whom the bill was referred in due course by the chief clerk, taxed off all the items prior to the date of the registration of the company.

Vice-Chancellor Bacon refused to disturb the taxation. The solicitor went to the Court of Appeal, and it was urged on his behalf (1) that the company had recognised his claim by a payment on account; (2) that what had taken place at the meeting before mentioned amounted to a novation; (3) that the company,

having had the benefit of the solicitor's services, was bound to pay for them. On neither of these grounds did the appellant succeed. No one appeared to oppose the claim or to sift the evidence on which it was formed, but, shortly stated, the view of the court was, that it was for the solicitor to show a contract, and that no sufficient evidence was forthcoming. Could he, apart from an express agreement, establish his claim? The articles, it is true, bound the company to pay the preliminary expenses, but, said Lord Justice Lindley, the solicitor "was no party to the articles." A provision in an Act of Parliament may enable an outsider to sue, because it gives rise to a statutory obligation, of which the person named can take the benefit (an action for debt on a statute is, or was, a well-known form of action at common law), but an agreement, whether contained in articles of association or any other form of document, between A. and B., that B. shall pay C., gives C. no right of action against B. It is simply a question of who are the contracting parties. The theory that where one person gets the benefit of another's services he is bound to pay for them is fallacious, or, at all events, not universally true. "If," said Lord Justice Lindley, by way of illustration, "I order a coat and receive it, I get the benefit of the labor of the cloth manufacturer; but does any one dream that I am under any liability to him?"

It is important to remember that, if in the case already noticed the solicitor had brought his action against the company simply on the ground that he had done the work charged for, and that the articles provided for payment of such expenses, he would not have succeeded. Articles of association simply constitute a contract between shareholders *inter se*. Sec. 16 of the Companies Act, 1862, does not give them any wider effect, even where the solicitor is expressly named as such in the articles. *Eley* v. *Positive Government Security, etc., Company* (34 L.T. Rep. N.S. 190) is in point. There the solicitor was so named in the articles, which further provided that he should transact all the legal business of the company "for the usual and accustomed fees and charges, and shall not be removed from his office except for misconduct." Lord Cairns, L.C., in dealing with this case, made some general remarks which professional men, connected with companies, have perhaps not heeded very carefully. After pointing out the limited character of the publicity given to the appointment, his Lordship said: "I also wish to reserve my judgment as to whether a clause of this kind is obnoxious to the principles by which the courts are governed in deciding questions of public policy; but it does appear to me a grave question whether a contract, under which a solicitor is not bound to give any particular services, but the company, on the other hand, are bound to employ him on all their business . . . is a contract which the court would enforce. I prefer to reserve my judgment on the validity of such an agreement until a case arises which calls for a decision on that point."

But, whatever may be the true view of the policy of binding or attempting to bind a company to employ a particular solicitor, secretary, or manager, it is now abundantly clear that it cannot be done by merely providing for the appointment in the articles of association. Such an article is either a stipulation which would

bind the members, or else it is merely a mandate to the directors. In the latter character such articles are still much in vogue in company circles. The mandate may frequently operate as a moral obligation to which the directors readily give effect, but its legal value is absolutely *nil*. Of course, however, if the solicitor can establish the fact of his employment for or on behalf of the company he would be entitled to remuneration for the work actually done. A company, as Lord Cairns explained, may act under their seal, or by the signature of the directors, or possibly by a resolution of the board. But, unless in either of these ways the solicitor gets his retainer, an article purporting to nominate him as the company's legal adviser will be of no avail if the directors choose to ignore it.

The principle laid down in *Eley* v. *Positive, etc., Company (ubi sup.)*, was followod later in *Browne* v. *La Trinidad* (37 Ch. Div. 1), where the board had removed a director, notwithstanding an article purporting to fix the duration of his office for a number of years. The court refused to give effect to the article notwithstanding the fact that the director in question was a shareholder, and claimed the benefit supposed to be conferred by s. 16 of the Companies Act, 1862. It was pointed out that there could be no contract between the plaintiff and the company until shares were allotted to him, and that "it would be remarkable that upon the shares being allotted to him a contract between him and the company as to a matter not connected with the holding of shares, should arise." It is therefore well settled that "contracts" of the class referred to cannot be enforced either on the common law side or in equity. It was thought, however, by some persons that a binding contract might be effected if the person intending to claim the benefit of the supposed contract actually subscribed the memorandum of association. This idea was dispelled by the decision of Mr. (now Lord) Justice Kay in *Re Dale* v. *Plant Limited* (W.N., July 6th, 1889). His Lordship decided that the secretary was not entitled, even in the circumstances mentioned, to prove in the winding up for damages in respect of an alleged agreement made between him and the promoters and confirmed by the directors in conformity with a clause in the articles authorising them to do so. Such a contract is incapable of confirmation. The plaintiff, for his services as secretary, was only entitled to a *quantum meruit* remuneration for work done; and, of course, given the like conditions, the same principle would equally apply in the case of a solicitor.—*Law Times.*

DIARY FOR JULY.

1. Wed.....Dominion Day. Long vacation begins.
3. Fri.....Quebec founded by Champlain, 1608.
5. Sun.....*6th Sunday after Trinity.* Battle of Chippewa, 1814.
6. Mon.....County Court Sittings for Motions, except in York. Surrogate Court Sittings.
7. Tues.....Col. Simcoe, Lieut.-Governor of Ontario, 1792.
9. Thur....Importation of slaves into Canada prohibited, 1793.
10. Fri.....Christopher Columbus born, 1447.
11. Sat.....Battle of Black Rock, 1812.
12. Sun.....*7th Sunday after Trinity.*
13. Mon.....Sir John B. Robinson, 7th C.J. of Q.B., 1829.
15. Wed.....Manitoba entered Confederation, 1870.
17. Fri.....Franco-German war began, 1870
19. Sun.....*8th Sunday after Trinity.* Quebec capitulated to the British, 1629.
20. Mon .....British Columbia entered Confederation, 1871
22. Wed.....W. H. Draper, 5th C.J. of Q.B., 1834. W. B. Richards, 3rd C.J. of C.P., 1863.
23. Thur.....Upper and Lower Canada united, 1840.
24. Fri.....Battle of Lundy's Lane, 1814.
25. Sat.....St. James. Canada discovered by Cartier, 1534
26. Sun.....*9th Sunday after Trinity.*
27. Mon.....Wm. Osgoode, 1st C.J. of Q.B., 1792
29. Wed.....First Atlantic cable laid, 1866.
30. Thur....Relief of Derry, 1689.

Early Notes of Canadian Cases.

EXCHEQUER COURT OF CANADA.

BURBIDGE, J.] [June 22.

THE QUEEN *v.* WM. F. MCCURDY ET AL.

The Expropriation Act (R.S.C., c. 39)—Assignment of rights of land expropriated previously acquired by lease—Effect of new leases between same parties—Compensation—Assignment of —Chose in action against the Crown—Evidence.

An agreement by a proprietor to sell land to the Crown for a public work, followed by immediate possession, and, within a year, by a deed of surrender, is sufficient under s. 6 of the Expropriation Act (R.S.C., c. 39) to vest the title to such land in the Crown and to defeat a conveyance thereof made subsequent to such agreement and possession, but prior to such surrender.

1. Under s. 11 of the said Act the compensation money for any land acquired or taken for a public work stands in the stead of such land, and any claim to or incumbrance upon such land is converted into a claim to compensation, and such claim once created continues to exist as something distinct from the land, and is not affected by any subsequent transfer or surrender of such land. *Partridge* v. *The Great Western Railway Co.* (8 U.C.C.P. 97); *Dixon* v. *Baltimore and Potomac Railway Co.* (1 Mackay 78), referred to.

2. Where a chose in action was assigned, *inter alia*, for the general benefit of creditors and all the parties interested were before the court, and the Crown made no objection, the court gave effect to such assignment.

Quære: In the absence of acquiescence in such an assignment, are the assignee's rights thereunder capable of enforcement against the Crown?

3. In a case of expropriation the claimant is not obliged to prove by costly tests or experiments the mineral contents of his land (*Brown* v. *The Commissioners of Railways*, 15 App. Cas. 240, referred to). Where, however, such tests or experiments have not been resorted to, the court or jury must find the facts as best it can from the indications and probabilities disclosed by the evidence.

BURBIDGE, J.] [June 25.

MARTIN *v.* THE QUEEN.

Injury to person on a public work—Negligence of servant of the Crown—Brakesman's duty in putting children off car when trespassers—Damages.

1. The Crown is liable for an injury to the person received on a public work resulting from negligence of which its officer or servant, while acting within the scope of his duty or employment, is guilty.

City of Quebec v. *The Queen* (2 Ex. C.R. 252) referred to.

2. One who forces a child to jump off a railway carriage while it is in motion is guilty of negligence.

3. The fact that the child had no right to be upon such carriage is no defence to an action for an injury resulting from such negligence.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

STREET, J.] [May 18.

ARMSTRONG *v.* AUGER.

Sale of land—Contract of sale—Local improvement rates—Incumbrances—Taxes—Vendor and purchaser—Independent covenants—Equitable relief—Payment into Court.

A contract for sale of lands provided for payment of the purchase money in quarterly instal-

ments; when half was paid the vendor was to convey and give the usual statutory covenants; the purchaser was to pay taxes from the date of the contract.

In an action to recover instalments under the contract,

Held, that local improvement rates imposed by municipal by-laws, the work under which was done before the contract, were incumbrances to be discharged by the vendor, but rates imposed after the contract were not so.

Re Graydon and Hammill, 20 O.R. 199, followed.

Les Ecclesiastiques de St. Sulpice de Montreal v. *City of Montreal*, 16 S.C.R. 400, distinguished.

Held, also, that the covenant for payment of instalments and the covenant against incumbrances were independent, and the vendor was entitled to judgment for the instalments; but the purchaser was entitled to show the existence of incumbrances as an equitable ground of relief, and, the time for completion of the contract not having arrived, to pay into Court as much of the purchase money as might be necessary to protect him against the incumbrances.

McDonald v. *Murray*, 11 A.R. 101, and *Tisdale* v. *Dallas*, 11 C.P. 238, distinguished.

Fullerton, Q.C., for the plaintiffs.

Marsh, Q.C., for the defendant.

ROSE, J.] [Dec. 23, 1890.

Div'l Court.] [June 5, 1891.

IN RE MCKAY *v.* MARTIN.

County Court—Jurisdiction—Ascertainment of amount—R.S.O., c. 47, s. 19, s-s. 2—Transferring action to High Court—54 Vict., c. 14, retrospective.

An action was brought in a County Court to recover the amount of a broker's commission on the sale of land. The defendant disputed his liability and the action was tried by a jury, who found that the plaintiff was entitled to recover $250. The amount was not ascertained otherwise than by the agreement of the parties, as found by the jury.

Held, by ROSE J., that the amount was not ascertained within the meaning of R.S.O., c. 47, s. 19, s-s. 2, and the County Court had no jurisdiction.

Robb v. *Murray*, 16 A.R. 503, followed.

Held, by the Divisional Court, that the Act 54 Vict. c. 14, passed after the determination that the County Court had no jurisdiction, was retrospective, and enabled the action to be transferred to the High Court.

Carscallen, Q.C., for the plaintiff.

Furlong for the defendant.

STREET, J.] [July 4.

RE G.

Land Titles Act—R.S.O., c. 116, s. 23, s-s. 5—Evidence—Woman past child-bearing—Registration.

Land was devised to the petitioner for life, with remainder in fee to her children surviving her. At the age of fifty-six the petitioner and one of her children (all the other surviving children having conveyed their shares to her) applied under the Land Titles Act, R.S.O., c. 116, to be registered as owners with absolute title.

The petitioner's monthly periods began at the age of eleven; she was married in her twenty-second year, and bore children rapidly till her thirty-sixth year, when her tenth child was born; five months after this her periods, having regularly continued, suddenly ceased, and up to the time of the application had never returned.

The evidence of a physician, who had made a medical examination of the petitioner, showed that senile atrophy of the uterus and ovaries had proceeded so far that it would be a moral impossibility for pregnancy to take place.

Held, having regard to the provisions of s. 23, s-s. 5, of the Act, that the Master should have accepted the evidence as sufficient proof that the petitioner was physically incapable of child-bearing, and should have acted upon it by granting the registration.

H. W. Mickle for the petitioners.

J. R. Cartwright, Q.C., for the Attorney-General, representing the Land Titles Act Assurance Fund.

Practice.

STREET, J.] [June 24.

MCILROY *v.* MCILROY

Notice of trial—Service of before defence filed—Irregularity—Close of pleadings—Rule 654.

On the last day for delivering the statement of defence, which was also the last day for

giving notice of trial for a sittings of the Court at which the plaintiff wished to go down, the plaintiff, without waiting for the statement of defence, delivered a joinder of issue and served notice of trial before two o'clock in the afternoon. Before three o'clock the same day the defendants delivered their defence. The defendants were in no default.

Held, that the notice of trial, being delivered before the close of the pleadings, was irregular under Rule 654 and should be set aside.

Broderick v. *Broatch*, 12 P.R. 561, distinguished.

C. J. Holman for the plaintiff.

C. W. Kerr for the defendant.

C.P. Div'l Court.] [June 27.

CONNOLLY *v.* MURRELL.

Discovery—Privilege—Communications between husband and wife—R.S.O., c. 61, s. 8.—Solicitor withdrawing from examination.

The decision of STREET, J., 14 P.R. 187, was affirmed on appeal to the Divisional Court (GALT, C.J., and MACMAHON, J.).

E. R. Cameron for the plaintiff.

Talbot Macbeth for the defendant.

OSLER, J.A.] [June 27.

SIMPSON *v.* CHASE.

Attachment of debts—Adjusted insurance moneys—Division Court attachment—Appeal to Court of Appeal—Time for giving security—Service of garnishee summons—Local agent of foreign insurance company—Defence of garnishee—Notice of rejection—Time—R.S.O., c. 51, ss. 149, 178, 182, 185, 188—Rule 935.

1. Security upon a Division Court appeal may be given by deposit after the ten days' delay allowed by s. 149 of the Division Courts Act, R.S.O., c. 51.

2. Service of a Division Court after judgment garnishee summons upon the local agent of a foreign insurance company, whose powers were limited to receiving and transmitting applications,

Held, effective, having regard to the provisions of ss. 182 and 185, s-s. 3, of R.S.O., c. 51.

3. Where the defence of the garnishee is put in after the expiration of the eight days from service of the summons allowed by s. 188, s-s. 2, of R.S.O., c. 51, so long as it is put in in sufficient time to enable the creditor to give notice rejecting it, and for the clerk to transmit such notice to the garnishee, the latter is not bound to attend the trial if such last mentioned notice is not given, and the creditor cannot proceed to the trial of the action until that is done.

4. A claim under an insurance policy for a loss, the amount of which has been settled and adjusted, is not a debt which can be attached under s. 173 of R.S.O., c. 51; and Con. Rule 935 does not apply to Division Courts.

Semble, even if it did, that such a claim could not be attached so long as the insurance company's right to have the money applied in rebuilding was open.

Aylesworth, Q.C., for the appellants.

C. L. Lewis for the respondent.

FERGUSON, J.] [July 3.

TURNER *v.* CROZIER.

Sheriff—Poundage—Allowance in lieu thereof—Rule 1233—Goods seized not those of execution defendant.

Where goods seized by a sheriff under execution were afterwards found not to be the goods of the execution defendant,

Held, that the sheriff was not entitled under Rule 1233 to an allowance in lieu of poundage in respect of the goods seized.

C. D. Scott for the plaintiff.

Aylesworth, Q.C., for the sheriff.

MACMAHON, J.] [July 4.

MCLEAN *v.* ALLEN.

Receiver—Right to bring an action in name of person beneficially entitled—Request—Delay.

A receiver appointed, by way of equitable execution, to receive the share of a judgment debtor under a certain will, applied for an order for leave to bring an action in the name of the debtor for construction of the will. The receiver had not requested the debtor to bring the action, and upon the application the latter expressed his willingness to do so and to proceed without unnecessary delay.

Held, that the receiver would have been en-

titled to the order if the debtor had refused to bring the action or had delayed unreasonably.

No order was made, but leave was reserved to the receiver to apply again if the debtor did not proceed with diligence.

A. McLean Macdonell for the receiver.

D. W. Saunders for the judgment debtor.

Notes of United States Cases.

NEW JERSEY SUPREME COURT.

NEW YORK L E. & W.R.R. *v.* BALL.

Negligence—Riding in baggage-car.

The plaintiff, who had purchased a ticket for a journey upon defendant's railroad, entered a combination smoking and baggage-car on one of the trains. Such car was the last one on the train; the forward compartment thereof was fitted up as a place for smokers, and the rear end of it was arranged for the carriage of the baggage. Every seat in the smoking compartment was occupied, and plaintiff passed into the baggage compartment. There was a rule of the company, of which plaintiff, however, was ignorant, requiring employees not to permit passengers to ride in baggage-cars. An accident occurred through a collision by a train in the rear.

Held, that the plaintiff, while taking the risk of any injury from dangers inherent in the construction and use of that portion of the car as a baggage compartment, had not, under the circumstances, assumed risks of injury from extraneous causes, and that his action for damages would lie.

EXCHEQUER COURT RULES.

In pursuance of the provisions contained in the 55th section of "The Exchequer Court Act," it is ordered that the following rules in respect of the matters hereinafter mentioned shall be in force in the Exchequer Court of Canada:

1. Rule 116 of the Exchequer Court of Canada is hereby repealed, and the following substituted therefor:

TRIALS.—RULE 116.

When any action is ripe for trial or hearing, a judge may, on application of any party and after summons served on all parties to the suit, fix the time and place of trial and hearing, and may direct when and in what manner and upon whom notice of trial or hearing together with a copy of the judge's order is to be served, and such notice and order shall be forthwith served accordingly.

Sittings of the Exchequer Court of Canada, at which any action ripe for trial or hearing may be set down for trial by either party thereto, upon giving the opposite party ten days' notice of trial, or by consent of parties, and without taking out any summons, or obtaining any directions as hereinbefore provided, may be held at any time and place appointed by a judge, of which notice shall be published in the *Canada Gazette*.

Such sittings will be continued from day to day until the business coming before the court is disposed of.

On the first day of each of such sittings, the court will hear any argument of demurrer, special cases, motion for judgment, appeal from the Report of the Registrar or other officer of the court, or other motion, application or business which cannot be transacted by a Judge in Chambers.

2. Rule 120 of the Exchequer Court of Canada is hereby repealed and the following substituted therefor:

RULE 120.

In case the judge is unable from any cause to attend on the day fixed for any sitting or for the trial of any issue, such sitting or trial shall stand adjourned from day to day until he is able to attend.

AUTUMN ASSIZES, 1891.

HOME CIRCUIT.

Rose, J.

Orangeville	Monday	7th Sept.
St. Catharines	Monday	14th Sept.
Milton	Monday	21st Sept.
Brampton	Thursday	24th Sept.
Toronto—Criminal	Monday	28th Sept.
Toronto—Civil	Monday	5th Oct.

MIDLAND CIRCUIT.

Armour, C.J.

Barrie	Tuesday	8th Sept.
Hamilton	Tuesday	15th Sept.

Whitby	Tuesday	22nd Sept.
Belleville	Monday	28th Sept.
Lindsay	Monday	5th Oct.
Peterborough	Thursday	8th Oct.
Cobourg	Monday	12th Oct.
Picton	Tuesday	20th Oct.

NORTH-WESTERN CIRCUIT.

Falconbridge, J.

Goderich	Monday	7th Sept.
Woodstock	Monday	14th Sept.
Owen Sound	Monday	21st Sept.
Guelph	Monday	28th Sept.
Brantford	Monday	5th Oct.
Walkerton	Monday	12th Oct.
Stratford	Monday	19th Oct.
Berlin	Monday	26th Oct.

SOUTH-WESTERN CIRCUIT.

MacMahon, J.

Chatham	Monday	14th Sept.
Sandwich	Monday	21st Sept.
Sarnia	Monday	28th Sept.
London	Monday	5th Oct.
St. Thomas	Monday	19th Oct.
Simcoe	Monday	26th Oct.
Cayuga	Monday	2nd Nov.
Welland	Thursday	5th Nov.

EASTERN CIRCUIT.

Street, J.

Perth	Monday	7th Sept.
L'Original	Thursday	10th Sept.
Ottawa	Monday	14th Sept.
Pembroke	Wednesday	23rd Sept.
Cornwall	Tuesday	29th Sept.
Brockville	Monday	5th Oct.
Kingston	Monday	12th Oct.
Napanee	Monday	19th Oct.

CHANCERY AUTUMN SITTINGS.

Ferguson, J.

Toronto	Wednesday	21st Oct.

The Chancellor.

Kingston	Monday	14th Sept.
Simcoe	Monday	21st Sept.
Ottawa	Monday	26th Oct.
Cornwall	Monday	2nd Nov.
Belleville	Thursday	5th Nov.
Brockville	Thursday	12th Nov.

Ferguson, J.

Brantford	Monday	7th Sept.
Cobourg	Thursday	10th Sept.
Peterborough	Monday	14th Sept.
Barrie	Monday	5th Oct.
Hamilton	Monday	12th Oct.
Whitby	Monday	19th Oct.

Robertson, J.

Lindsay	Monday	7th Sept.
Stratford	Thursday	10th Sept.
St. Catharines	Wednesday	14th Oct.
Owen Sound	Monday	19th Oct.
Guelph	Thursday	22nd Oct.
Woodstock	Monday	26th Oct.

Meredith, J.

Walkerton	Monday	14th Sept.
St. Thomas	Monday	21st Sept.
Goderich	Monday	5th Oct.
Chatham	Monday	12th Oct.
Sandwich	Monday	19th Oct.
Sarnia	Monday	2nd Nov.
London	Monday	9th Nov.

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Latest additions:

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Firth (T.W.S.), Liability of Employers, London, 1890.

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Law Students' Department.

LAW SCHOOL.

At a meeting of Convocation held on the 30th June, some matters of special interest to law students in connection with the Law School were dealt with by the Benchers.

Under the rules as they stood prior to that date a student not being a graduate of a university, who was obliged to attend three courses of lectures at the Law School, was compelled to take them in the third, fourth and fifth years of his service under articles. In other words, he had to attend in consecutive years and in all the later years of his studentship.

By an amendment of the rules passed on the 30th ult., these students may, at their option, take the first year of their course during the first or second year of their service under articles or attendance in barristers' chambers upon giving notice to the principal at least one week before the commencement of the session of the school.

Another change made is in the fee to be paid for attendance at the lectures.

Hitherto it has been $10 each session, but upon the oint report and recommendation of the Finance and Legal Education Committees, to which the question of the fees to be paid was some time ago referred by Convocation, the fee to be hereafter paid has been increased to $25.

Notice has been given of a proposal to amend the rules with regard to the award of medals and scholarships, and the matter will be taken up next term.

Under the existing rules there can be awarded among the successful honor candidates in the third or final examination in the Law School one gold medal, one silver medal, and one bronze medal, and there can be awarded among the successful honor candidates in each of the first and second year examinations, one scholarship of $100, one of $60, and one of $40.

It is now proposed to offer a further stimulus to the students by increasing these awards by awarding one gold, two silver, and three bronze medals in the final, and one scholarship of $100, one of $60, and five of $40 each, in the first and second year courses of the school.

EXAMINATION BEFORE EASTER TERM : 1891.

SECOND INTERMEDIATE.

Snell's Equity.

Examiner: A. W. AYTOUN-FINLAY.

1. What trusts are excepted from the provisions of the Statute of Frauds requiring trusts in general to be manifested in writing?

2. What is necessary to render a post-nuptial settlement good, against a subsequent purchaser for value, under the 27 Eliz., c. 4?

3. In what respects are Charities favored by equity above individuals, and in what respects are they treated with disfavor?

4. What are the three heads under which bequests or legacies may be classed? Give examples of each.

5. Under what circumstances will the Court remove children from the custody of the father, and commit them to the care of a guardian?

6. "Ignorance of the law excuses no man." How is the application of this maxim limited?

7. Under what circumstances will oral evi-

dence be received where there is a written instrument relating to the matter in issue?

8. Where the debtor has not appropriated a payment of money, may the creditor appropriate it in satisfaction of a debt already barred by the Statute of Limitations?

9. Explain and illustrate the principle—"Once a mortgage always a mortgage."

10. What is the rule as to satisfaction of legacies by subsequent legacies:

(*a*) Where the legacies are given by the same instrument?

(*b*) Where the legacies are given by different instruments?

Williams on Personal Property.

Examiner: A. W. AYTOUN-FINLAY.

1. What is the distinction between "chattels real" and "chattels personal"?

2. A. finds a valuable gold ring. He is ignorant of the real owner. He takes it to B., a jeweller, to have it valued, and, on telling B. that he had found it, B. retains it, not claiming property therein, but only on the ground that he does so until the real owner is discovered. Can A. bring an action of trover against B.? Give the reason of your answer.

3. What formalities are requisite to effect the alienation of personal property?

4. A. grants his chattels personal to B. by deed, there being no valuable consideration therefor. Afterwards A. assumes to revoke his grant. What are the rights of the parties?

5. In what case may the property in goods pass from one person to another by payment of their value, without actual sale?

6. What is the nature and effect of a writ *fieri facias?*

7. Explain briefly the following terms: (*a*) bottomry bond; (*b*) respondentia; (*c*) jettison; (*d*) general average.

8. To what extent does the mere participation in the profits of a business impose liability for the debts incurred in carrying it on?

9. A. gives a written guarantee to B. in the following words: "In consideration of the sum of $2,000, at present due by C. to you, for goods sold and delivered to him six months ago, I hereby guarantee payment of the same." B. brings action on this guarantee and A. defends. What is the legal position of the parties?

10. What title only is a vendor of shares in a joint stock company bound to show?

Leith's Blackstone.

Examiner: M. G. CAMERON.

1. Explain the different modes by which Colonies are established or acquired and what system of laws is to be considered in force?

2. What is the difference between an annuity and a rent charge, and give an example of each?

3. Is the word successors necessary in a grant of land to a corporation aggregate? Explain.

In what way does such a grant differ from an ordinary fee simple?

4. Enumerate the *incidents* to a tenancy in tail.

5. A. conveys by deed duly executed a parcel of land to B. in fee. B. had prior to the conveyance made an agreement with A. to reconvey to him by way of mortgage to secure the unpaid purchase money. B. carries out his agreement without his wife joining. Is she entitled to dower? Explain.

6. What is the difference between a tenant for life and a tenant for years with regard to their right to emblements?

7. What are the necessary requisites to the establishment of a title by prescription?

Common Law—Constitutional Law.

Examiner: F. J. JOSEPH.

1. Briefly state the constitution of the Superior Courts of Ontario, and what is the jurisdiction of County Courts in actions for the recovery of land.

2. What is the distinction between a good consideration and a valuable consideration, and will either of these considerations support a voluntary conveyance?

3. Malice is the gist of an action for libel. When will the law presume that the publisher acted maliciously?

4. How may a tenant deprive himself of the right to remove fixtures?

5. A. purchases a desk at a public auction; on examining it after it is delivered to him, he finds a large sum of money in a drawer of the desk. Can A. keep the money?

6. Define "duress" and what effect has it on a contract?

7. A., an infant, draws a bill of exchange in favor of B. on an incorporated company, which is duly accepted. B. endorses it to C., who, without endorsing it, discounts it at the bank. The bill at maturity is dishonored. What are the rights of the bank against the several parties mentioned?

CALL.

Equity and Evidence.

Examiner: A. W. AYTOUN-FINLAY.

1. A. insures the life of B., his child, in the child's own name, but for his, A.'s, benefit. B. dies. The insurance company makes no objection as to want of insurable interest.

Do the policy moneys belong to A. or to the estate of B.?

What is the equitable principle involved?

2. A., a trustee, has been guilty of a breach of trust. He makes good the breach out of his own property, and, immediately thereafter, assigns as an insolvent for the benefit of creditors.

How far is the transfer to the trust estate a fraudulent preference, and to what extent is the trust estate liable?

3. A mortgagee takes possession of the mortgaged estate by giving notice to the tenants to pay their rent to him.

A number of the tenants of the mortgagor are tenants for terms of years, the terms being created subsequently to the date of the mortgage.

How are these tenancies affected by the mortgagee taking possession?

4. A., a vendee of land, has obtained possession of the property, and thereafter an action for specific performance of the contract of sale is commenced.

What terms are ordinarily imposed upon the vendee in equity?

5. Trust property in the care of a trustee is alleged by him to be stolen.

How far is he responsible for the loss?

6. What is meant by pre-appointed or casual evidence?

Must it appear in any prescribed form?

Harris' Criminal Law.

Examiner: A. W. AYTOUN-FINLAY.

1. A. obstructs officers of the law in their efforts to apprehend B., a supposed criminal.

What is the legal measure of the offence of which A. is guilty?

2. What is the distinction between libel and slander?

Give examples of indictable slander.

3. A. and B. are indicted and tried together for conspiracy to extort money from C., by threatening to injure his reputation.

There is some evidence against A., who is found guilty, whilst B. is found not guilty, by the jury.

What course must be taken by the court, and why?

4. A., a roofer, being on top of a building, sees B., against whom he has a grudge, passing on the sidewalk below.

As if by accident, he drops a heavy adze from edge of the roof; an expression which he uses to a companion at the same time sufficiently showing his intent to injure B.

The tool misses B., and fatally injures C., a complete stranger to A.

Is A: guilty of any crime? Explain briefly.

5. A., an infant, hires furniture under the hire and purchase system, and afterwards, without the knowledge of the person supplying the furniture, removes and sells it.

Is A. guilty of any offence, and, if so, how?

6. In what respects is the admission or rejection of evidence at trial ground for a new trial?

7. Is evidence as to the character of parties to a civil action ever admissible?

If so, under what circumstances?

8. Under what circumstances is self-harming evidence admissible, in civil and criminal cases respectively?

9. How far is the evidence of petty jurors admissible to prove alleged misconduct of other jurors in the jury room, during the consideration of a verdict?

Blackstone: Theobold on Wills, Law, and Pleadings and Practice.

Examiner: M. G. CAMERON.

1. Is a will in all cases revocable? If so, has B., with whom A. has made a covenant not to revoke a will, any, and, if so, what remedy in case of a breach of the covenant?

2. A. directs B., his son, to sign his name to his will. C. and D., the two witnesses, are present when B. signs, and see him do so, and they

sign in the presence of A. Is that a sufficient acknowledgment so as to render the will valid?

3. By his will A. gives $1,000 to B., and by a codicil the legacy to B. is revoked, and the same legacy is given to C., who predeceases the testator. Is the legacy to B. revoked? Explain.

4. Where a will which has not been revoked at the testator's death cannot be found, what evidence wil be required to prove its contents?

5. What presumption is raised where a will bearing an execution or attestation clause is unexecuted or unattested, and how may each presumption be rebutted?

6. In what cases will the court appoint a receiver of infants' estates?

7. To procure an order for the allowance of service of a writ of summons out of the jurisdiction, what must be shown?

8. When, if at all, will a demurrer for misjoinder of parties be proper?

9. What are the rules as to vouching accounts? When should vouchers be produced, and when will items be allowed without voucher?

10. In order to enable a party, without leave, to plead and demur to the same pleading at the same time, what steps must be taken?

Dart on Vendors and Purchasers.

Examiner: M. G. CAMERON.

1. Is a trustee always bound to convey at the request of the *cestui que trust?* Explain.

2. At what time does the vendor's liability in respect to defects of title end? If A. purchases a parcel of land from B., pays the whole of his purchase money and goes into possession, but is subsequently evicted by an adverse claimant, C., what, if any, claim has he against A.?

3. Where a conveyance is executed, but the whole of the purchase money is not paid over, and there is an incumbrance upon the property which it is intended should be discharged, what precautions should a purchaser, under such circumstances, take?

4. The contract for sale fixes a certain day for completion. It is not completed on that day owing to the purchaser's delay. His purchase money, nevertheless, has been lying idle and appropriated to the purchase and he has not been in possession. Is he bound to pay interest, and, if so, from what period? What are his rights, if any, against the vendor?

5. Is there any exception to the rule that when the purchaser is in actual possession or receipt of the rents and profits he must pay interest upon his purchase money from the time fixed for completion of the contract? Explain.

Constitutional Law—Contracts.

Examiner: F. J. JOSEPH.

1. To what extent is the common law of England in force in a colony obtained by conquest or acquired by occupancy; and what Imperial Acts affect colonies with independent legislatures?

2. What are the powers of the Crown as to restraining a subject from leaving the country or compelling him to leave the country?

3. By whom must a notice of dishonor of a bill be given, and what are the requisites of such notice?

4. May the holder of a note or bill fill in his own name where no payee's name is mentioned; and should he do so, under what circumstances (if any) can he recover against the drawer or acceptor?

5. What is meant by a "holder in due course"?

6. What are the liabilities of an infant partner or shareholder—(*a*) during infancy, (*b*) after he attains twenty-one years of age?

7. A., by letter, offers to sell a house to B. for a certain sum, and gives him a week to accept the offer. During the week, A., unknown to B., offers the same house to C., who accepts A.'s offer; subsequently, but within the week, and before A. withdraws his offer to B., B. accepts A.'s offer. What are the rights of B. and C.?

8. A debt is barred by the statute. What are the rights of a creditor who has

(*a*) A lien on the goods of the debtor for a general account?

(*b*) A lien for a particular debt?

(*c*) Where he receives money from the debtor?

(*d*) Where the debtor sues him for another claim?

(*e*) Supposing the creditor is an executor of the debtor, can he retain out of the estate such a debt?

Law Society of Upper Canada.

Regulations for the Admission of Barristers as Solicitors under 54 Vict., c. 25.

1. Any persons applying for a certificate of qualification to be admitted as a solicitor under the provisions of the Act 54 Vict., c. 25, shall furnish proof—

(*a*) That notice of his intention to apply for such certificate, signed by a Bencher, was given to the Secretary at least two months preceding the first day of the term in which he intends to apply for such certificate;

(*b*) That notice of his intention as aforesaid was also published once a week, for at least two months preceding the first day of such term, in some newspaper in the county town of the county in which such person resides;

(*c*) That he was duly called to the bar prior to the first day of January, 1891, and has been in actual practice, and that he still remains a member of the bar in good standing, and that since his call no adverse application to disbar him or otherwise to disqualify him from practice as a barrister has been sustained, and that no charge is pending against him for professional or other misconduct;

(*d*) That he has passed the usual examination prescribed for admission to practise as a solicitor;

(*e*) That he has paid the fees payable by candidates for admission to practise as a solicitor.

2. The notice mentioned in sub-sections (*a*) and (*b*) shall be in the following form, viz.:—

"Law Society of Upper Canada.

"Mr.....(some Bencher) gives notice that Mr. A. B., who has been called by the Law Society to the degree of barrister-at-law prior to the first day of January, 1891, will next term apply to the Law Society for a certificate under the corporate seal of the Society of his fitness and capacity, and that he is in all respects duly qualified to be admitted as a solicitor.

"As of.....term, 189....

.....

(Bencher's Signature.)

3. The Secretary shall receive such notice upon payment of one dollar, and shall make two lists containing the names, additions, and residences of the persons intending to apply as aforesaid, and affix one of such lists in a conspicuous place in his office, and the other in Convocation Hall.

4. The certificate to be granted shall be in the following form:

"These are to certify that Mr. A. B., who has been called by the Law Society to the degree of barrister-at-law prior to the first day of January, 1891, having now satisfied the Society of his fitness and capacity, and that he is in all respects duly qualified to be admitted as a solicitor, may be admitted and enrolled as a solicitor in accordance with the provisions of the statutes in that behalf.

"In testimony whereof I, E. B., Treasurer of the said Society, have to these presents affixed the seal of the said Society, at Osgoode Hall, this.....day of.....in the year of Our Lord one thousand eight hundred and.....and the..... year of Her Majesty's reign.

"J. H. E., "E. B.,
"*Secretary.* "*Treasurer.*"

5. The person applying for and obtaining such certificate shall pay therefor the sum of two dollars.

Standing Committees for 1891.

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Discipline.

Messrs. John Hoskin (Chairman), A. B. Aylesworth, Alexander Bruce, A. J. Christie, Donald Guthrie, J. K. Kerr, F. Mackelcan, Jas. Magee, C. Robinson, G. F. Shepley, G. H. Watson, Sir A. Wilson.

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SPECIAL COMMITTEES, 1891.

LAW SCHOOL BUILDING COMMITTEE.

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SPECIAL COMMITTEE ON THE ADMISSION OF MISS CLARA BRETT MARTIN AS STUDENT-AT-LAW.

Messrs. S. H. Blake, D. Guthrie, J. Idington D. McCarthy, E. Martin, W. R. Meredith Charles Moss, W. R. Riddell, G. F. Shepley.

THE LAW SCHOOL, 1891.

LEGAL EDUCATION COMMITTEE.

CHARLES MOSS, Q.C., *Chairman.*

W. BARWICK. E. MARTIN, Q.C.
JOHN HOSKIN, Q.C. W. R. MEREDITH, Q.C.
Z. A. LASH, Q.C. W. R. RIDDELL.
C. MACDOUGALL, Q.C. C. H. RITCHIE, Q.C.
F. MACKELCAN, Q.C. C. ROBINSON, Q.C.
J. V. TEETZEL, Q.C.

This notice is designed to afford necessary information to Students-at-Law and Articled Clerks, and those intending to become such, in regard to their course of study and examinations. They are, however, also recommended to read carefully in connection herewith the Rules of the Law Society, copies of which may be obtained from Principal of the Law School, Osgoode Hall, Toronto.

Those Students-at-Law and Articled Clerks, who, under the Rules, are required to attend the Law School during all the three terms of the School Course, will pass all their examinations in the School, and are governed by the School Curriculum only. Those who are entirely exempt from attendance in the School will pass all their examinations under the existing Curriculum of The Law Society Examinations as heretofore. Those who are required to attend the School during one term or two terms only will pass the School Examination for such term or terms, and their other Examination or Examinations at the usual Law Society Examinations under the existing Curriculum.

Provision will be made for Law Society Examinations under the existing Curriculum as formerly for those students and clerks who are wholly or partially exempt from attendance in the Law School.

Each Curriculum is therefore published herein accompanied by those directions which appear to be most necessary for the guidance of the student.

CURRICULUM OF THE LAW SCHOOL, OSGOODE HALL, TORONTO.

Principal, W. A. REEVE, M.A. Q.C.

Lecturers: E. D. ARMOUR, Q.C.
A. H. MARSH, B.A., LL.B., Q.C.
R. E. KINGSFORD, M.A., LL.B.
P. H. DRAYTON.

The School is established by the Law Society of Upper Canada, under the provisions of rules passed by the Society with the assent of the Visitors.

Its purpose is to promote legal education by affording instruction in law and legal subjects to all Students entering the Law Society.

The course in the School is a three years' course. The term commences on the fourth Monday in September and closes on the first Monday in May; with a vacation commencing on the Saturday before Christmas and ending on the Saturday after New Year's Day.

Students before entering the School must have been admitted upon the books of the Law Society as Students-at-Law or Articled Clerks. Admission is to be gained during Easter and Trinity terms only. The steps required to procure such admission are provided for by the rules of the Society, numbers 126 to 141 inclusive.

The School term, if duly attended by a Student-at-Law or Articled Clerk is allowed as part of the term of attendance in a Barrister's chambers or service under articles.

The Law School examinations at the close of the School term, which include the work of the first and second years of the School course respectively, constitute the First and Second Intermediate Examinations respectively, which by the rules of the Law Society, each student and articled clerk is required to pass during his course; and the School examination which includes the work of the third year of the School course, constitutes the examination for Call to the Bar, and admission as a Solicitor.

Honors, Scholarships, and Medals are awarded in connection with these examinations. Three Scholarships, one of $100, one of $60, and one of $40, are offered for competition in connection with each of the first and second year's examinations, and one gold medal, one silver medal, and one bronze medal in connection with the third year's examination, as provided by rules 196 to 205, both inclusive.

The following Students-at-Law and Articled Clerks are exempt from attendance at the School.

1. All Students-at-Law and Articled Clerks attending in a Barrister's chambers or serving under articles elsewhere than in Toronto, and who were admitted prior to Hilary Term, 1889.

2. All graduates who on the 25th day of June, 1889, had entered upon the *second* year of their course as Students-at-Law or Articled Clerks.

3. All non-graduates who at that date had entered upon the *fourth* year of their course as Students-at-Law or Articled Clerks.

In regard to all other Students-at-Law and Articled Clerks, attendance at the School for one or more terms is compulsory as provided by the Rules numbers 155 to 166 inclusive.

Any Student-at-Law or Articled Clerk may attend any term in the School upon payment of the prescribed fees.

Students and clerks who are exempt, either in whole or in part, from attendance at The Law School, may elect to attend the School, and to pass the School examinations, in lieu of those under the existing Law Society Curriculum. Such election shall be in writing, and, after making it, the Student or Clerk will be bound to attend the lectures, and pass the School examination as if originally required by the rules to do so.

A Student or Clerk who is required to attend the School during one term only, will attend during that term which ends in the last year of his period of attendance in a Barrister's Chambers or Service under Articles, and will be entitled to present himself for his final examination at the close of such term in May, although his period of attendance in Chambers or Service under Articles may not have expired. In like manner those who are required to attend during two terms, or three terms, will attend during those terms which end in the last two, or the last three years respectively of their period of attendance, or Service, as the case may be.

Every Student-at-Law and Articled Clerk before being allowed to attend the School, must present to the Principal a certificate of the Secretary of the Law Society shewing that he has been duly admitted upon the books of the Society, and that he has paid the prescribed fee for the term.

The Course during each term embraces lectures, recitations, discussions, and other oral

methods of instruction, and the holding of moot courts under the supervision of the Principal and Lecturers.

During his attendance in the School, the Student is recommended and encouraged to devote the time not occupied in attendance upon lectures, recitations, discussions or moot courts, in the reading and study of the books and subjects prescribed for or dealt with in the course upon which he is in attendance. As far as practicable, Students will be provided with room and the use of books for this purpose.

The subjects and text-books for lectures and examinations are those set forth in the following Curriculum :

FIRST YEAR.

Contracts.

Smith on Contracts.
Anson on Contracts.

Real Property.

Williams on Real Property, Leith's edition.

Common Law.

Broom's Common Law.
Kerr's Student's Blackstone, Books 1 and 3

Equity.

Snell's Principles of Equity.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

SECOND YEAR.

Criminal Law.

Kerr's Student's Blackstone, Book 4.
Harris's Principles of Criminal Law.

Real Property.

Kerr's Student's Blackstone, Book 2.
Leith & Smith's Blackstone.
Deane's Principles of Conveyancing.

Personal Property.

Williams on Personal Property.

Contracts and Torts.

Leake on Contracts.
Bigelow on Torts—English Edition.

Equity.

H. A. Smith's Principles of Equity.

Evidence.

Powell on Evidence.

Canadian Constitutional History and Law.

Bourinot's Manual of the Constitutional History of Canada. O'Sullivan's Government in Canada.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to the above subjects as shall be prescribed by the Principal.

THIRD YEAR.

Contracts.

Leake on Contracts.

Real Property.

Dart on Vendors and Purchasers.
Hawkins on Wills.
Armour on Titles.

Criminal Law.

Harris's Principles of Criminal Law.
Criminal Statutes of Canada.

Equity.

Lewin on Trusts.

Torts.

Pollock on Torts.
Smith on Negligence, 2nd edition

Evidence.

Best on Evidence.

Commercial Law.

Benjamin on Sales.
Smith's Mercantile Law.
Chalmers on Bills.

Private International Law.

Westlake's Private International Law.

Construction and Operation of Statutes.

Hardcastle's Construction and Effect of Statutory Law.

Canadian Constitutional Law.

British North America Act and cases thereunder.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

During the School term of 1890-91, the hours of lectures will be 9 a.m., 3.30 p.m., and 4.30 p.m., each lecture occupying one hour, and two lectures being delivered at each of the above hours.

Friday of each week will be devoted exclusively to Moot Courts. Two of these Courts will be held every Friday at 3.30 p.m., one for the Second year Students, and the other for the Third year Students. The First year Students will be required to attend, and may be allowed to take part in one or other of these Moot Courts.

Printed programmes showing the dates and hours of all the lectures throughout the term, will be furnished to the Students at the commencement of the term.

GENERAL PROVISIONS.

The term lecture where used alone is intended to include discussions, recitations by, and oral examinations of, students from day to day, which exercises are designed to be prominent features of the mode of instruction.

The statutes prescribed will be included in and dealt with by the lectures on those subjects which they affect respectively.

The Moot Courts will be presided over by the Principal or the Lecturer whose series of lectures is in progress at the time in the year for which the Moot Court is held. The case to be argued will be stated by the Principal or Lecturer who is to preside, and shall be upon the subject of his lectures then in progress, and two students on each side of the case will be appointed by him to argue it, of which notice will be given at least one week before the argument. The decision of the Chairman will be pronounced at the next Moot Court, if not given at the close of the argument.

At each lecture and Moot Court the roll will be called and the attendance of students noted, of which a record will be carefully kept.

At the close of each term the Principal will certify to the Legal Education Committee the names of those students who appear by the record to have duly attended the lectures of that term. No student will be certified as having duly attended the lectures unless he has attended at least five-sixths of the aggregate number of lectures, and at least four-fifths of the number of lectures of each series during the term, and pertaining to his year. If any student who has failed to attend the required number of lectures satisfies the Principal that such failure has been due to illness or other good cause, the Principal will make a special report upon the matter to the Legal Education Committee. For the purpose of this provision the word "lectures" shall be taken to include Moot Courts. Examinations will be held immediately after the close of the term upon the subjects and text books embraced in the Curriculum for that term.

The percentage of marks which must be obtained in order to pass any of such examinations is 55 per cent. of the aggregate number of marks obtainable, and 29 per cent. of the marks obtainable on each paper.

Examinations will also take place in the week commencing with the first Monday in September for students who were not entitled to present themselves for the earlier examination, or who having presented themselves thereat, failed in whole or in part.

Students whose attendance at lectures has been allowed as sufficient, and who have failed at the May examinations, may present themselves at the September examinations at their own option, either in all the subjects, or in those subjects only in which they failed to obtain 55 per cent. of the marks obtainable in such subjects. Students desiring to present themselves at the September examinations must give notice in writing to the Secretary of the Law Society, at least two weeks prior to the time fixed for such examinations, of their intention to present themselves, stating whether they intend to present themselves in all the subjects, or in those only in which they failed to obtain 55 per cent. of the marks obtainable, mentioning the names of such subjects.

Students are required to complete the course and pass the examination in the first term in which they are required to attend before being permitted to enter upon the course of the next term.

Upon passing all the examinations required of him in the School, a Student-at-Law or Articled Clerk having observed the requirements of the Society's Rules in other respects becomes entitled to be called to the Bar or admitted to practise as a Solicitor without any further examination.

The fee for attendance for each Term of the Course is the sum of $10, payable in advance to the Secretary.

Further information can be obtained either personally or by mail from the Principal, whose office is at Osgoode Hall, Toronto, Ontario.

The Canada Law Journal.

VOL. XXVII. AUGUST 15, 1891. No. 13.

SIR JOHN THOMPSON'S Criminal Code, which was introduced this session, as "The Criminal Law Act of 1891," has been distributed; nothing more, however, will be done about it during the present session.

ONE of the best edited and most interesting of our legal journals is the *Indian Jurist*, published at Madras. There is much truth in the remarks of the *Washington Law Reporter*, which says that our Indian contemporary "is a shining illustration of the capacity of our British cousins to adapt themselves to circumstances, and, like the Romans of old, to erect a civilization in strange lands and out of the most uncouth material. There, away out in British India, they have built up a body of law, superior in many respects, because untrammelled by ancient precedents, to that enjoyed by the Englishman on his native shore. They have their own legal literature and their own law reports, which latter, by the way, would be quite a curiosity to many of our readers. Think of having to report a case under the title of *Sandashir Rayaji* v. *Maruti Vithal;* or *Easwara Doss* v. *Pungavanachari;* or *Faki Abdulla and another* v. *Babaji Gungaji*, and having to state as a part of the syllabus that the case of *Rao Karan Singh* v. *Raja Bakar Ali Khan* and *Mohima Chunder Mozoomdar* v. *Mohesh Chundea Neogi* are explained!"

THE question as to whether the Law Society of this Province has the right to allow a woman to be entered as a student of the law as a step to becoming a member of the Law Society will shortly come up for decision. Miss Clara Brett Martin having made an application to be admitted as a student, her application was referred to a special committee of the Benchers, which, we understand, is of opinion that authority was not intended to be given to the Law Society to admit women as members thereof, and that the application should therefore not be granted. The matter will come before the Benchers for consideration on the 15th September next, when a battle royal may be expected, as doubtless the cause of this "mayden faire" will find some champion ready to enter the lists on her behalf. We reserve comment for the present. The following authorities and reviews will be of interest in this connection: *Bradwell's Case*, 55 Ill. 535; *Goodell's Case*, 39 Wis. 232; *Robinson's Case*, 131 Mass. 376; *Lady Sandhurst's Case*, 23 Q.B.D. 79; *Chorlton* v. *Lings*, L.R. 4 C.P. 374; 18 Irish Law Times, p. 306; 30 Albany Law Journal, p. 464; Sol. Journal, vol. 12, p. 762; American Law Review, N.S., vol. 4 (1883), pp. 670, 675, 6-7-8-9; Pump Court, April 25th, 1891, p. 2.

THE question was recently asked of the Government in the House of Commons as to whether the title of Q.C. is conferred upon advocates in the district of Quebec in view of their merits or professional success, or in consideration of political services. The Minister of Justice replied that the title was conferred in view of professional merit and he was not informed of the politics of the recipients, and that it was the intention to confer the title in the manner most equitable and in the best interest of the profession. We are convinced that Sir John Thompson is perfectly sincere in his utterance, and that he desires to act, and, so far as he has been a free agent, has acted in good faith in this matter. As to how the title has been conferred in Quebec, we are not in a position to judge; but if he includes the Province of Ontario, and if he is responsible for those who have been appointed in recent years, we are compelled to say that he has in many cases been grossly deceived by those who have brought names before him or recommended them to him. It is notorious that many of the appointments which have been made in this province were of men who not only had no professional merit, but some of whom were hardly professionally respectable; some never appeared in court, never were engaged in an important case, and were unknown to their brethren or the public except as political hacks, and of some the less said the better. What was once an honorable distinction has now become a professional joke. When Sir John Thompson knows the Ontario Bar as well as we do who live here, he will recognize the truth of what we say. We trust that the vicious system which the leaders of the political parties have countenanced so long (but for which the country does not hold the present Minister of Justice responsible), and which has brought such discredit upon the Dominion, is soon to receive its death blow; at least, the present disclosures at the capital have, we apprehend, disgusted the public as much as the distribution of silk has disgusted the profession. We regret to have to say it, but history will say that the late Premier did not exercise the supervision he should have done in this matter.

IT is said that we must go abroad to learn what is happening at home; for example in the *Green Bag*, of Boston, for last month (a periodical which gives *itself* the title of being a "useless but entertaining magazine for lawyers"), we have an interesting account of the Law School of Osgoode Hall, Toronto, by our old friend, D. B. Read, Q.C.

He begins at the beginning, taking us back to the meeting of the Law Society in the town of Newark on 17th July, 1797, where it was resolved, "That the two Crown Officers be nominated Benchers of the Law Society, together with four Senior Barristers, and that the Benchers, according to seniority, take upon themselves the Treasurership of the said Society annually."

The first thought of a Law School seems to have been in the year 1822. A voluntary association called the Advocates' Society was formed, made up of barristers and students, who, in imitation of the Law Society, elected one of their number to be Bencher, with other officers. We are told that there was a book kept of their proceedings which has been preserved and presented to the Law Society by Sir Adam Wilson, in which it is recorded that this Advocates'

Society, which Mr. Read says was in effect a Law School, or a *quasi* Law School, met on the 20th of January, 1823, and cases were argued and decided by the presiding Bencher; the counsel engaged on the day alluded to being the Hon. Robert Baldwin, Attorney-General of Canada, Mr. Notman, and Mr. Richardson

Mr. Read then carries us down from that time until the present, giving a full account of the various changes made from time to time. *En passant*, he refers to his recollection of the lectures given to their pupils by the late John Hillyard Cameron and ex-Chief Justice Sir Adam Wilson; and, previously to that, of having attended the lectures of the late Hon. William Hume Blake, then Professor of Law in King's College and afterwards Chancellor of Upper Canada —lectures which, he says, in point of matter and delivery, were not surpassed by a Story or a Kent.

As we know, the Law Schools which were opened in October, 1873, and again revived in 1881, both came to an untimely end. The need, however, for a Law School of some sort was so apparent that, in 1889, it was reorganized in its present form. We trust that it may be a success, and that the pen of the veteran writer, whose article we have been reading, may not have the opportunity of preaching its funeral sermon, even should he happily outspan the allotted "fourscore years."

We are glad to see in a recent number of the *Indian Jurist*, of Madras, some remarks which appeal to us most strongly, in reference to the so-called right of the parent to the custody and mismanagement of his offspring. It takes a long time, and perhaps we should be glad that it does so, for a Britisher to free himself from the prejudices and habits of thought of a bygone age. Dr. Barnardo, that most enterprising and devoted philanthropist, in his very clever and sensible defence of his conduct in the *Roddy Case*, has opened the eyes of many to the position of things in England in reference to the question of the custody of infants. The *Indian Jurist*, in reviewing his speeches before the judges of the Court of Appeal in the case referred to, uses the language quoted below, which must appeal to the common sense, if not to the hearts, of many readers. It is simply iniquitous that immoral parents, utterly regardless of their duties to their offspring, should, under nearly all circumstances, be allowed to keep the control of them as against those who, from the very highest motives, and in a common sense, practical way, seek the moral and temporal advancement of children who, but for their philanthropic efforts, would either perish miserably, or eventually become pests of society, hateful to themselves and injurious to the commonwealth. Our contemporary thus speaks:—"The ancient superstition in favor of leaving every precious infant to the tender mercies of ignorant and careless fathers and mothers tends, of course, to the destruction, year after year, of the bodies of numberless human beings, and in the cases of those whose natural guardians happen to be idle, dissolute, wicked, or more than ordinarily foolish, tends also to the destruction of their immortal souls; whilst in all but a very few exceptional cases, the work of rearing the young is badly done by amateurs, instead of being well done (as it might and should be) by professionals and experts. During generations to come, probably, great difficulty will be ex-

perienced by philosophers in convincing the well-to-do classes that they are quite 'unfit' to be trusted with the management of children, and even the masses will continue for a while to exhibit an ignorant impatience of state interference with the exercise of domestic rights. But some day good sense will prevail over foolish impulses, and individual instincts and yearnings give place to altruistic and patriotic aims and aspirations; and then at last children will have a fair chance of attaining, one and all, the sound mind in the sound body. In the meantime, we must possess our souls in patience while our little ones perish from neglect in myriads; and our boys fail to find a livelihood; and our army and navy are starved, though the finest material for them may be found in abundance in every street of our towns, ungathered and wasted; and our girls are left to the worst of fates. But every day it becomes more and more difficult for men of generous natures to maintain patience about this most weighty matter. The population of great Britain grows apace, and the question how best to deal with it presents constantly increasing difficulties. And so we have in fiction cases like 'Ginx's baby,' and in our law-courts cases like the *Roddy Case*. These two cases resemble one another very closely in some respects, and we are not sure but that, on the whole, the real case is more amusing and instructive than the imaginary case, to the properly philosophic mind. For in it the incomparable Doctor Barnardo has been good enough unconsciously to reveal to the public part at least of the riches of his inner self."

GRAND JURIES.

THE question of the abolition of the Grand Jury system has been brought before the Senate by the following motion by Mr. Senator Gowan: "That an humble address be presented to His Excellency the Governor-General; praying that His Excellency will cause to be laid before this House copies of all correspondence between the Department of Justice and the Judges in Canada charged with judicial functions in criminal matters as well as the Attorney-General of each province, respecting the expediency of abolishing the functions of the Grand Jury in relation to the administration of Criminal Justice."

The learned Senator, in making his motion, referred to the circular issued some time since by the Minister of Justice, and addressed to all the judges in Canada exercising criminal jurisdiction, and to the Attorney-General in each province, soliciting opinions on the subject, and thus referred to the result of the circular: "Over 100 replies were sent to the Department of Justice in answer to the circular. These replies are from some, and, in fact, nearly all leading legal minds in the country; I have not gone over them, but a summary that I obtained from the Department shows that no less than fifty of those who sent in answers are in favor of abolition, thirty-nine against, ten doubtful, and two who have declined to answer, so that on the whole, as far as numbers are concerned, a very considerable majority is in favor of abolition, and a very respectable minority against it. I have not seen, and have not analyzed, what they said on the subject. I have not been able to study the arguments used, but I notice, taking the

first three names, Judge Taschereau, one of the ablest lawyers in Canada, and a man who, although of French origin, has produced the very ablest book on criminal law now in use—one that is a *vade mecum* in every court in Canada—is the first of those who are in favor of abolition. The next is Mr. Justice Gwynne, also a very able criminal lawyer, one who was engaged for many years as Crown counsel, and afterwards sat for years on the bench of the Superior Court of Ontario, and now occupies a place in the Supreme Court of the Dominion. Then, there is Chancellor Boyd, whom we in Upper Canada all know to be a most eminent jurist. While on the other side, taking the first three in the order that I received the list, I find that Attorney-General Mowat, Chief Justice Hagarty, and Sir Thomas Galt, all able men, hold an opposite opinion, so far as I can make out. Perhaps I was not so much surprised with regard to one or two of the gentlemen named, but I certainly felt surprised when I saw the name of Hon. Mr. Mowat, Attorney-General of Ontario, opposed to this change; for he has been for many years (and I have admired his conduct in taking the course he did) a great law-reformer, and the obstacles in the way of justice which 'the wisdom of our ancestors' had placed in his way—all these technical absurdities, he bore down and toppled over without the slightest hesitation. He was most energetic in the way of reform—in fact, he was almost like a hippopotamus rushing through a cane-brake in his desire to make direct and plain the path of ready justice. When I see his views and the arguments he uses, I will perhaps be able to appreciate the reasons why he occupies the position that he does. At present all I can say is, I am somewhat surprised that so able a man and so valuable a man, as a law reformer, has taken the view that he appears, on this occasion, to have taken. What I ask is, that these papers be produced, and the reason I ask it is this: It is a very important question. It very seriously touches the administration of justice, and here we find one hundred men competent to form an opinion on the subject—men exercised in the office of justice, forming different opinions, some fifty on one side and some thirty-nine on the other, while some are doubtful. I have not gone into an analysis by provinces, but I find that in most of the provinces the judges are pretty equally divided, while in my own province the majority of the judges who have spoken on the subject is slightly in favor of abolishing the system. Now, while I admit, and, I think, would claim, that the greatest weight should be attached to their opinions, I must admit also that they are not infallible, and with the proper material before them intelligent laymen can as well dispose of such matters as perhaps the most astute lawyer. The condition being this, that a large number are for and a large number against, the majority, however, being in favor of the abolition of the grand jury, the material is there for every one capable of reasoning to form a correct conclusion on the subject. I do not intend to ask, nor do I expect, immediate action. I have the fullest confidence in the men who control public affairs, and I have no doubt that at the proper time they will take action. I do not propose to follow up this motion with any action this session, nor perhaps later, if I should be convinced that the reasoning is against me, but what I want is this: that that valuable contribution to the discussion should be within reach of every man, layman as

well as lawyer, judges and attorney-generals—that it should be in the hands of all, to enable every one who takes an interest in the subject to form an intelligent opinion, and to enable me, who has taken some pains on the subject, to get the views of those who differ from me."

No action will be taken this session in reference to this matter.

RESPECTING DIVORCES.

We can scarcely regret that the bill introduced into the Senate by Senator Macdonald, respecting divorce, has been withdrawn, at least in view of the present information on that subject. As explained by the introducer, the act did not contemplate the establishing of a divorce court, but would give jurisdiction to the superior courts of the various provinces to adjudge the dissolution of marriages or order judicial separations on the ground of adultery or desertion by the husband. One argument for the act was that we should have the best tribunal possible for hearing and deciding questions of such vast importance, and that no religious scruples should be allowed to interfere with the free course of law and justice, nor to stand in the way of enacting laws for the good of the subject, regulating the forces touching social life. It was also urged that religious precepts and example are not sufficient to control humanity in the paths of virtue and honesty, and that the strong arm of the secular law is necessary. It is true that the present parliamentary system, by reason of its expense and intricate formula, deters many from applying for divorce; but whilst this is so, it cannot, on the other hand, be denied that facilities in this direction have not conduced to morality either in England or the United States. We are, therefore, at present inclined to take the views expressed by the late Premier of Canada, who preferred the present system, inasmuch as it does thus offer considerable impediment to the granting of divorces. The remarks of Mr. Senator Gowan in opposing the second reading of the bill are in point:

"In entertaining applications for divorce and making a law to set the parties free to marry again—changing their status—Parliament can properly bring in view considerations of expediency or public advantage. A court of justice is necessarily restrained within fixed limits, and its procedure controlled by fixed rules, in matters assigned to it for adjudication between party and party. Parliament would be making a law, and the supreme power of the State (within constitutional limits, of course) would have to consider what would most tend to the public good. The courts but expound and administer law which Parliament enacts. The point is forcibly put by a learned writer on the sources of law; the functions of the legislator are in reality not legal but moral. With him the primary enquiry is, What ought to be? And he only enquires what is, to suit his provisions to the law, already in force. With the lawyer, on the other hand, what is, is always the primary enquiry, and there his enquiry stops.

"It is true, applications for divorce have always been based upon a specific charge, and the facts necessary to support that charge established by satisfactory evidence, and so far the proceeding is *quasi* judicial. Inquisition is made and the

truth or falsity of the facts alleged determined, and to that extent there is an analogy to the proceedings of a court. But whether, by reason of the facts proved, the prayer of the petitioner should be granted, opens considerations for Parliament which could not be permitted to judges when called upon to pronounce what the judgment should be. Further, in criminal cases the executive may be called upon to decide whether, in view of all the facts and circumstances, the judgment of the court should be carried in effect or modified. Now, Parliament may be said to unite in itself all these three duties and functions. It decides whether the charges are proved, whether they constitute such a case as should entitle the parties to a special act for relief, and what relief, if any, should be granted to the party, in view of all the circumstances; and Parliament may, and ought always, to have in regard, not merely the question as it affects the parties, but the effect in relation to morals and good order —the effect which the passing a particular law might have upon the well-being of the community. Parliament, as the supreme power, has its duties and responsibilities, and cannot compromise the well-being of society which has been entrusted to it under the constitution. These are the considerations which brought me to the conclusion that, in the present aspect of the question, any delegation of the power respecting divorce would be inexpedient."

Were it not for the determined opposition on religious grounds of a large number in the legislature, it is quite likely that we should legislate in the same direction as England and the United States; but whilst the argument in favor of a divorce court is both plausible and forcible from the standpoint of its advocates, we cannot be sorry that Mr. Macdonald, having felt the sense of the House, consented to withdraw his bill without a division.

COMMENTS ON CURRENT ENGLISH DECISIONS.

PRINCIPAL AND SURETY—RELEASE OF SURETY BY GIVING TIME TO PRINCIPAL—PROPERTY OF SURETY HELD AS SECURITY RELEASED WHEN SURETY IS RELEASED—PRACTICE—PARTIES TO REDEMPTION ACTION.

Bolton v. *Salmon* (1891), 2 Ch. 48, is a decision of Chitty, J., in which two points are discussed. The action was a redemption action, brought by a puisne mortgagee to redeem a prior mortgage. The mortgage which the plaintiff claimed to redeem was of two undivided one-fourth shares in a farm, and also of a charge in the entirety of the whole farm, and was made by Susan Booty and Sarah Buckenham. The plaintiff's mortgage was made by Sarah Buckenham and others. Susan Booty's share was not represented in the action, and it was held that the action was defective for want of parties. "Where a mortgage is made by two tenants in common, both of them must be parties to the action to redeem; one cannot redeem in the absence of the other," per Chitty, J., at p. 52.

The other point was this: Sarah Buckenham had joined in the mortgage under which the plaintiff claimed as surety for John Buckenham; time had been given to John Buckenham without the consent of Sarah, in consequence

of which it had been held that she was released from personal liability (see *Bolton* v. *Buckenham* (1891), 1 Q.B. 278, *ante* p. 104), and the question now raised was whether or not this had the effect of also discharging the property charged by Sarah as security. Strange to say, there was no direct authority cited on the point, the nearest case being *Hodgson* v. *Hodgson*, 2 Keen 704, where it was held that the release of one co-surety discharged the security given by the other; on principle, however, the learned judge had no difficulty in deciding that the discharge of the surety from personal liability also discharged the property given by the surety as security. That being the case, the plaintiff's right to redeem failed altogether.

COMPANY—WINDING UP—DISSOLUTION—ACTION BY CREDITOR AGAINST DIRECTORS.

Coxon v. *Gorst* (1891), 2 Ch. 73, was an action by a creditor of a company against the directors to recover dividends wrongfully paid by them out of the capital of the company. The company had been wound up, and under s. 111 of the Companies Act, 1862, an order had been made for the dissolution of the company. Under these circumstances, Chitty, J., held that the action could not be maintained, for even if such an action could be maintained by a creditor when the company is still *in esse*, of which he expressed doubt, the dissolution of the company in the absence of fraud being alleged he considered was an absolute bar to the action. We may observe that the Dominion Winding-Up Act contains no provision for enabling the Court to dissolve a company.

PRACTICE—MORTGAGE ACTION—ORDER FOR POSSESSION.

In *Thynne* v. *Sarl* (1891), 2 Ch. 79, North, J., held that an order for delivery of possession in a mortgage action ought to contain a specific description of the mortgaged lands. We may observe that this is contrary to the well-settled practice in Ontario, where it has always been held to be unnecessary to insert a specific description of the lands in the judgment or final order, it being deemed sufficient that it appears in the indorsement on the writ or statement of claim, if any.

PRACTICE—MORTGAGE ACTION—FORECLOSURE—DECEASED MORTGAGOR—REPRESENTATIVE FOR THE ACTION—RULE 68—(ONT. RULE 310).

Aylward v. *Lewis* (1891), 2 Ch. 81, was an action for foreclosure, in which the defendant, the mortgagor, died insolvent before foreclosure absolute. There was no legal personal representative of his estate, and an order was made in Chambers appointing one of his next of kin to represent his estate for the purposes of the action; but on the application for a final order, North, J., refused to make the order in the absence of "a properly constituted representative of the mortgagor."

INJUNCTION—DISMISSAL OF SCHOOLMASTER.

In *Fisher* v. *Jackson* (1891), 2 Ch. 84, the plaintiff was a schoolmaster of an endowed school, and was, under the deed of trust, subject to removal by the vicars of three specified parishes. Two of the vicars served on the plaintiff a

notice of dismissal, signed by themselves. No meeting of the three vicars had been summoned to consider the question of the plaintiff's dismissal, and he had not been heard in his defence, nor was there any evidence that the third vicar had been consulted in the matter. The plaintiff now applied for an interim injunction to restrain the two vicars who had signed the notice from removing or purporting to remove him from his office until the holding of a meeting of the vicars, and until the plaintiff should have had an opportunity of being heard at such meeting in reply to the charges made against him. North, J., after a careful review of the cases, decided that the plaintiff was entitled to the injunction, and that for defendants to dismiss the plaintiff without giving him an opportunity to be heard in his defence was contrary to the first principles of justice, and that it was also incompetent for the defendants to act without the third vicar having an opportunity of being present upon the discussion of the question of the dismissal of the plaintiff.

SOLICITOR AND CLIENT—ORDER FOR TAXATION—ORDER OBTAINED ON SUPPRESSION OF FACTS.

In re Webster (1891), 2 Ch. 102, a client having sued his solicitor for money received to his use, and the solicitor having delivered a bill of costs and filed a defence claiming a set-off in respect of such costs, the client took out an order of course to tax the costs; and this order having become inoperative by neglect of the client to proceed upon it, the client then applied for and obtained another order of course for taxation of the bill, suppressing the fact of the existence of the action and of the issue of the former order. On a motion to discharge this order for irregularity, North, J., held that there had been a suppression of material facts, and that a special application ought to have been made for the order; he, however, suffered the order to stand so far as it directed taxation, but struck out the clause directing payment of what might be found due, and reserved the question of payment and the costs of the action to be disposed of by the judge at the trial of the action.

VENDOR AND PURCHASER—CONDITION LIMITING TITLE TO LESS THAN 40 YEARS—OBJECTION TO ANTERIOR TITLE DISCOVERED BY PURCHASER—DELAY IN GIVING NOTICE TO VENDOR—RESTRICTIVE COVENANT.

In re Cox & Neve (1891), 2 Ch. 109, was an application under the Vendors and Purchasers' Act. The conditions of sale provided that the title should commence with a mortgage dated 29th July, 1852, and that the purchaser should within fourteen days after the delivery of the abstract deliver all his objections to the title, and that subject thereto the title should be deemed to be accepted. The abstract was delivered on 24th June, 1890. On the 8th July the purchaser delivered his objections. He was not satisfied with the vendors' replies, and on 23rd July he delivered further requisitions. On 9th August he commenced proceedings under the Vendors and Purchasers' Act, asking for a declaration that his objections had not been sufficiently answered. On the 16th October he filed an affidavit in support of the application, setting up for the first time the existence of a covenant in a deed of 3rd March, 1847, restricting the right of building on part of the property. This objection the Court held that the purchaser must

be deemed to have had notice of shortly before 23rd of July. On the part of the vendors, it was contended that the purchaser was too late in taking the objection; but North, J., was of opinion that the existence of the restrictive covenant constituted a valid objection to the title, and that the purchaser was not precluded by his delay from relying on it, and that he was entitled to be relieved from the contract.

VENDOR AND PURCHASER—VOLUNTARY SETTLEMENT—SALE BY TRUSTEES—TITLE—EVIDENCE OF SETTLEMENT.

In re Briggs & Spicer (1891), 2 Ch. 127, trustees claiming under a voluntary settlement sold the trust estate. The settlement was liable to be defeated by a trustee in bankruptcy in the event of the settlor becoming insolvent within ten years after the date of the settlement, unless it could be shown that he was solvent when it was made. This fact was held by Stirling, J., to constitute a valid objection to the title; and although the objection might possibly be removed by the settlor concurring in the sale, and by his conveying to the purchaser, and the latter paying the purchase money by the settlor's direction to the trustees, yet such a title could not be forced on an unwilling purchaser because the Court would not assist the settlor to get rid of his own settlement: and also because there was no means of ascertaining conclusively that the settlement was not in the first instance, or had not subsequently become, a settlement for value.

MORTGAGE—PAYMENT OFF BY PERSON SUPPOSING HIMSELF TO BE OWNER OF EQUITY OF REDEMPTION—EFFECT OF PAYMENT OF MORTGAGE AS AGAINST PARTIES CLAIMING ADVERSELY TO PERSON PAYING—PRESUMPTION OF INTENTION TO KEEP MORTGAGE ALIVE.

In re Pride, Shackell v. *Cobnett* (1891), 2 Ch. 135, a person claiming to be the owner of five-sixths of the equity of redemption in mortgaged property paid off the mortgage and took a reconveyance, and an assignment of the mortgage as to the one-sixth share which he did not claim to own; subsequently the conveyance of one undivided one-sixth share in the equity of redemption under which the payer claimed was set aside, and the owner of this share claimed that the mortgage had been discharged as against her, but Stirling, J., held that the person paying off the mortgage must be presumed to have intended to keep the mortgage alive as against this share.

VENDOR AND PURCHASER—SPECIFIC PERFORMANCE—PURCHASER IN POSSESSION AND TITLE ACCEPTED—PAYMENT OF PURCHASE MONEY INTO COURT—OPTION TO GIVE UP POSSESSION.

In *Grenwood* v. *Turner* (1891), 2 Ch. 144, which was an action by a vendor for specific performance of contract for the purchase of land, the plaintiff made an interim application to compel the defendant to pay his purchase money into Court *pendente lite* on the ground that he was in possession and had made no objection to the title. Kekewich, J., however, held that the defendant was entitled to a month in which to elect either to pay his purchase money into Court or give up possession; and that a purchaser in possession is always entitled to this option unless he has done something which interferes with the value of the property.

DEBENTURE HOLDER OF COMPANY—RECEIVER, APPOINTMENT OF, AT INSTANCE OF MORTGAGEE BEFORE DEFAULT—COMPANY—INSOLVENCY.

McMahon v. *North Kent Ironworks* (1891), 2 Ch. 148, was an action by a debenture holder of a limited company, whose security created a charge upon the assets of the company for the appointment of a receiver of the property and assets of the company, which had become insolvent. No default had been made in payment of principal or interest secured by the debentures. The only direct precedent for the application was an unreported decision of North, J., which Kekewich, J., followed and granted the application, appointing a receiver until judgment or further order.

MISTAKE OF LAW—OFFICER OF THE COURT—COMPANY—WINDING UP—ASSETS INCREASED BY HONEST MISTAKE OF SHERIFF—REPAYMENT BY OFFICER OF COURT OF MONEY RECEIVED THROUGH MISTAKE OF LAW.

In re Opera (1891), 2 Ch. 154, executions having been placed in a sheriff's hands against the goods of a limited company, the sheriff seized goods and chattels of the company. Subsequently a petition was presented for winding up the company, an order was made for winding up the company, and a liquidator was appointed without prejudice to the rights of the sheriff. After this the sheriff, erroneously believing himself entitled to do so, seized the money received at the doors of the company's theatre, and out of the moneys so received paid the execution creditors and his own fees, and delivered up the balance, together with the goods and chattels seized by him, to the liquidator. Subsequently, on the application of the liquidator, it was held that the sheriff had no right to seize the money taken at the doors after the winding-up order, and he was ordered to pay over the amount so received by him to the liquidator. The goods and chattels which had been under seizure by the sheriff, and which he might have sold to satisfy the executions in his hands notwithstanding the winding-up order, having been sold by the liquidator, the sheriff applied to be refunded out of the proceeds of the goods the amount paid by him to the execution creditors, and his own fees, and Kekewich, J., held that he was entitled to this relief, on the ground that the Court would not allow its officer (the liquidator) to take advantage of a mere mistake of law by retaining money to the prejudice of those who had an honest claim to it, notwithstanding that the mistake under which the liquidator received the money might be one which as between ordinary litigants could not be rectified by the Court.

CONVERSION OF CHATTELS—TRUSTEE, RIGHT OF, TO SUE FOR CONVERSION OF CHATTELS BY CESTUI QUE TRUST—AUCTIONEER, WHEN LIABLE FOR CONVERSION OF GOODS—EVIDENCE—PRACTICE.

Barker v. *Furlong* (1891), 2 Ch. 172, was an action for the conversion of goods and chattels. The plaintiffs were trustees for the goods and chattels in question, and had permitted the *cestui que trust* who was entitled to them for life to have the possession of them; the *cestui que trust*, with the assistance of his brother, sent the goods to an auctioneer, who sold them and handed them over to the purchasers. The action was brought by the trustees against the *cestui que trust*, his brother, and the auctioneer, for the value of the goods and chattels. The

principal point discussed was as to the liability of the auctioneer. Romer, J., although of opinion that where an auctioneer only settles the price of goods as between vendor and purchaser, and takes his commission, he is not liable as for conversion if the vendor has no right to sell, yet he held that when, as in this case, the auctioneer receives goods into his custody, and on selling them hands them over to the purchasers with a view to passing the property in them, then he is liable to the rightful owner; his case differing from that of a packing agent or carrier, in that the latter merely purport to change the position of the goods and not the property in them.

After the defendants' case had been closed, an application was made by the plaintiffs' counsel for leave to call as a witness one of the defendants, whom he expected would have been called in support of his (the defendant's) own case. But the learned judge, considering the plaintiffs' counsel had deliberately elected not to call the defendant, in the expectation that he would be called as a witness on his own behalf, and counsel admitting that he had not been misled by any representation that the defendant would be called, refused the application.

One other point was also raised, viz., whether the brother of the *cestui que trust* was bound to indemnify the auctioneer; but the Court held that no promise to indemnify could be implied. The brother had represented himself as acting by the authority of the *cestui que trust* and he had that authority, and the auctioneer knew that the goods were being sold by the latter's direction, and the claim of the auctioneer in this respect was therefore dismissed.

Notes on Exchanges and Legal Scrap Book.

STATEMENT OF COUNSEL NOT EVIDENCE.—Where a prosecuting attorney expressed to the jury his belief that the defendant was guilty, the Supreme Court of Illinois reversed the conviction in part on the ground of his having done so.—*Raggio* v. *People.*

WHO ARE A FIRST WIFE'S HEIRS?—American cases often contain novel points. Not long since a curious legal riddle was propounded at the Court of Allentown, Pennsylvania. A gentleman married, and his wife dying, left him all her property, merely stipulating that on his death it should revert to "our heirs." The gentleman subsequently married again, and then died himself, whereupon his widow claimed that she was entitled by way of dower to one-third of the property left by the first wife. The next-of-kin, however, disputed this claim, urging that they had a preferential right over a connection by marriage, and the judge supported this view, holding that the husband had only a life interest in his first wife's property, and, therefore, on his death the estate would have to pass to the relations of the first wife, to the exclusion *in toto* of the second wife.—*Law Journal.*

ABSOLUTE PRIVILEGE OF COUNSEL.—In the recent and now celebrated case of *Cumming* v. *Wilson* one of the witnesses claimed, but without avail, the protection of the Court from certain remarks of the Solicitor-General. The Master of the Rolls in the case of *Munster* v. *Lamb*, 52 L.J. Rep. Q.B. 726, states very clearly the absolute privilege of counsel and the reasons therefor in these words: "A counsel's position is one of the utmost difficulty. He is to speak of that which he knows; he is not called upon to consider whether the facts with which he is dealing are true or false. What he has to do is to argue as best he can without degrading himself, in order to maintain the proposition which will carry with it either the protection or the remedy which he desires for his client. If, amidst the difficulties of his position, he were to be called upon during the heat of his argument to consider whether what he says is true or false, or whether what he says is relevant or irrelevant, he would have his mind so embarrassed that he could not do the duty which he is called upon to perform. More than a judge, infinitely more than a witness, he wants *protection* on the ground of benefit to the public."

DISTRESS FOR RENT.—A picture sent back by the purchaser to the artist to be touched up or altered is not exempt from distress for rent upon the artist's studio. So it was held by Mathew, J., sitting without a jury, in *Van Knoop* v. *Moss*, and the authorities as awhole seem fully to bear out his lordship's opinion. It has, indeed, been said (see *Parsons* v. *Gingell*, 16 Law J. Rep. C.P. 227) that if articles are sent to a place to remain there they are distrainable, but that if sent for a particular object, and if the remaining at the place be an incident necessary for the completion of that object, they are not. But the better opinion is that the exemption from distress arises solely for the benefit of trade and commerce (see *Lyons* v. *Elliott*, 45 Law J. Rep. Q.B. 159), as is shown by the exemption being held applicable to pawned goods at a pawnbroker's (*Swire* v. *Leach*, 34 Law J. Rep. C.P. 150), and to a carriage sent to a coachmaker for sale (*Findon* v. *M'Laren*), but not to horses and carriages standing at livery (*Francis* v. *Wyatt*, 1 W. Bl. 483), or even to a ship in the course of being built in a dock, as was held by the Court of Appeal in *Clarke* v. *The Millwall Dock Company*, 55 Law J. Rep. Q.B. 378. There is no doubt that the law of distress presses very hardly on the property of persons who are strangers to the landlord. Even their money, if contained in a sealed bag, may be seized for the rent of a friend with whom they may be staying, though money loose cannot be seized (see Bac. Abr. "Distress," B., citing 22 Ed. IV. 506). [The above is subject, however, so far as we are concerned, to R.S.O. cap. 143, s-s. 27, 28.]—*Law Journal.*

EVIDENCE OF THE SOVEREIGN.—In the *Berkeley Peerage Case*, so it is said in Taylor on Evidence, 8th edit., vol. ii., p. 1175, in reference, no doubt, to the case heard at the beginning of the present century, "counsel entertained some idea of calling the Prince Regent as a witness, but it ultimately became

unnecessary to do so." In the *Berkeley Peerage Case* which is now being heard before the Privileges Committee of the House of Lords, a letter signed by George IV. was held inadmissible, but without any direct overruling of *Abignye* v. *Clifton*, Hol. 213, in which the simple certificate of James I. as to what passed in his hearing was admitted in evidence *in the lifetime* of His Majesty. *Abignye* v. *Clifton*, however, is a case which has been very much questioned (see Best on Evidence, 7th edit., p. 185), and the better opinion seems to be that the evidence of the sovereign, if given at all, must be given on oath (see Taylor, citing 2 Lord Campbell's Lives of the Chancellors, 510). It is, of course, perfectly clear, as was pointed out by Baron Parke in *The Attorney-General* v. *Radloff*, 10 Ex. p. 94, that the sovereign cannot be compelled to give evidence, and we think it to be equally clear that the deduction of Baron Parke from this, to the effect that the sovereign cannot be a witness at all, was quite unsound. The fact, however, remains undoubted, that in no case has the sovereign yet appeared as a witness, and that Charles I. took upon himself to direct the judges of his day to leave the question of admissibility of his evidence an undetermined one in point of law.—*Law Journal.*

EVIDENCE OF A JUROR.—At the recent Bedford Assizes, a prisoner on his trial for rape, after giving evidence himself in denial of the charge, under the Criminal Law Amendment Act, 1885, proposed to call one of the jurors as a witness to his character. Mr. Justice Williams declined to allow the juror to be sworn, but said that he might give his fellow-jurors the benefit of his knowledge in deliberating on the verdict, and this having been done the jury acquitted the prisoner. We have much doubt whether the practice pursued was in accordance with precedent. It appears to be a settled rule (see Best on Evidence, 7th edition, p. 193) that a juryman may be a witness for either of the parties to a cause which he is trying, and "it is essential that this should be so, as otherwise persons in possession of valuable evidence would be excluded if placed on the jury panel, and might even be fraudulently placed there for the purpose of excluding their testimony." It is said, too (see Starkie on Evidence, 3rd edition, p. 542), that if a juror know any facts material to the issue he ought to be sworn as a witness, and if he privately state such facts it will be ground of motion for a new trial. The rule was applied to a criminal trial in *Regina* v. *Rosser*, 7 C. & P. 648; and though we can find no instance of its being applied to a witness merely to character, we cannot but think that it ought to be applied to such a witness, on the ground that the test of cross-examination cannot be properly employed to testimony privately given in the jury-box. It is true, no doubt, that witnesses to character are seldom cross-examined, but their liability to cross-examination is undoubted. Moreover, if evidence as to character be given privately in the jury-box, there will not be the same facility for the prosecution, under 6 & 7 Wm. IV., c. 111, giving evidence, if they should happen to possess it, that the prisoner has been previously convicted of felony.—*Law Journal.*

RECENT DECISIONS ON THE LAW OF INFANTS.—The decisions during the past year have touched upon most of the points usually giving rise to controversy in the Courts upon the law relating to infants—viz., Contracts, Maintenance, Custody, and Procedure, most of the decisions being those of the Chancery Division. The first two cases mentioned in the following article illustrate the principle of the mutuality of contracts. In *De Francesco* v. *Barnum* (No. 1), 59 Law J. Rep. Chanc. 151; L.R. 43 Chanc. Div. 165, an attempt to apply the rule laid down in *Lumley* v. *Wagner* to the covenants in an apprenticeship deed failed, Mr. Justice Chitty holding, on the authority of *Gylbert* v. *Fletcher* (Cro. Car. 179), that, inasmuch as no action could be brought against an infant upon a covenant to serve, the negative clauses in this apprenticeship deed could not be enforced by injunction; and in the second action, before Mr. Justice Fry, the covenants in the deed being held unreasonable, no action was maintainable against a showman for enticing the apprentice away from the plaintiff's employment. By the Infants' Relief Act (37 & 38 Vict., c. 62), s. 1, all voidable contracts by infants (1) for money lent or to be lent, or (2) for goods supplied or to be supplied (other than contracts for necessaries), and (3) all accounts stated with infants, are declared to be absolutely void. In the case of *Valentini* v. *Canali*, 59 Law J. Rep. Q.B. 74; L.R. 24 Q.B. Div. 166, the infant plaintiff had agreed to become tenant of a house and to pay a sum for the furniture therein. He occupied the house for some months, paid part of the agreed sum, and used the furniture. This contract, not being one of those mentioned in the above section, was held not to entitle the plaintiff to recover the sum paid to the defendant. In *Lowe* v. *Griffiths*, 1 Scott, 458, an infant was held liable for the lease of a dwelling-house suitable to his circumstances. Again, in *Duncan* v. *Dixon*, 59 Law. J. Rep. Chanc. 437; L.R. 44 Chanc. Div. 211, Mr. Justice Kekewich held that a marriage settlement made by an infant on his marriage in 1878 (since dissolved) was, as regards the infant, voidable, and not void by the section above referred to. The case of *Martin* v. *Martin*, L.R. 1 Eq. 369, had decided that maintenance should be allowed out of a legacy to an infant, whether vested or contingent, in the manner most beneficial to the infant, and Mr. Justice North's decisions in *In re Wells*; *Wells* v. *Wells*, 59 Law J. Rep. Chanc. 113; L.R. 43 Chanc. Div. 281, and in *In re Jeffery*; *Burt* v. *Arnold*, applied that principle. *In re Scott*; *Scott* v. *Hanbury* again before Mr. Justice North decided that section 2 of the Infants' Settlement Act (18 & 19 Vict., c. 43), which enacted that the death of an infant under twenty-one avoids any appointment or disentailing assurance executed under the Act, does not, unless the infant is tenant in tail, make the settlement void by reason of the infant having died while still an infant. In *In re Phillis*, 56 Law J. Rep. Chanc. 337; L.R. 34 Chanc. Div. 467, the Court had decided that a settlement can be made under the Act after the wife, having been married under the age of seventeen, has attained that age, provided the settlement is really made upon the occasion and for the purposes of marriage. *Regina* v. *Barnardo*, *Jones's Case*, affirmed the *prima facie* right of a mother to the custody of her illegitimate child, which *Regina* v. *Nash*, 52 Law J. Rep. Q.B. 442; L.R. 10 Q.B. Div. 454, had established. . . .—*Law Journal.*

THE DECISION OF QUESTIONS OF FACT.—The decision of questions of fact by judges and referees is often a disagreeable, though not usually a difficult, duty. It is disagreeable because it is frequently impossible to avoid seeming to cast suspicion upon reputable parties or witnesses. Where there is palpable perjury, it probably does not affect a magistrate's sensibilities in the least to say so. But the unpleasant cases are those in which the truth-stretching is largely unconscious. Many a controversy is decided against a party on the facts, apparently in the teeth of his solemn oath, when in reality his testimony was not deliberately untrue. He had started with a basis of fact in his mind, which had been gradually modified, exaggerated and colored by self-interest. His attorney, in all probability, had gone through a similar process, until at the time of the trial it would have been impossible for either of them to state the circumstances with anything like fairness. We are not referring merely to dishonest men or illiterate men. The best and wisest of us are subject to the deflecting influence of the personal equation. To aid in deciding issues of fact, there is first the feature constantly given as a reason for not reversing judgments as against the weight of evidence. The original tribunal sees the witnesses, hears them testify, and notices their manner. These, of course, are valuable helps in arriving at the actual circumstances. A skilful piece of cross-examination often makes the determination of the controversy a foregone conclusion almost from the start. If, however, both sides appear equally truthful under the ordeal of cross-examination, a reliable key to the problem is to be found in the admitted facts. The disputed facts are to be tried by the conceded facts, and rarely will this test fail to suggest presumptions so strong that they may safely be followed. Such process of weighing the probabilities is a strictly scientific one, analogous to a physician's method of diagnosis from physical symptoms or any other method of scientific inquiry. It cannot be said to demonstrate the truth of the conclusion, but it produces a high degree of probability, sufficient for all purposes in civil actions, and working out substantial justice in the large majority of cases. Science is only a higher form of common sense, and we believe that the mental process by which juries reach verdicts is essentially the same as that above outlined. In instances where there are no external helps from the manner or appearance of the witnesses, jurymen necessarily take the conceded facts as a touchstone, and decide which version of the disputed facts is more consistent with it. We do not say that such intellectual action is always deliberate or conscious; it is rather the instinctive course of a normal human mind in searching for truth. It is practicable, therefore, for the average man, without special education or professional training, to arrive at results on disputed facts which in most cases are correct. Juries, when they disagree, do not, as a rule, divide in the middle. Rarely will a jury stand 6 to 6, or 7 to 5, or even 8 to 4. In disagreements it is customary to find nine or more for one side, and one, two, or three for the other; and the majority is almost invariably for giving a verdict in accordance with the opinion, on the merits, of educated outsiders who have watched the trial or kept track of the evidence. The great hope of counsel on the wrong side of a cause is to capture one or more jurymen of not quite normal

mental constitution, or peculiarly open to sentimental considerations of some sort, and artfully play on such eccentricities. The suggestion often made, to allow verdicts in civil cases to be given by a vote of three-fourths of the jury, deserves to be kept constantly before the public. It is our opinion that in most trials nine jurymen out of twelve reach a just and truthful result by legitimate scientific methods, and that the best interests of the community would, in the long run, be subserved by doing away with the requirement for a unanimous vote.—*New York Law Journal.*

ITEMS FROM HINDOSTAN.—In this country our readers have doubtless noticed that when one pulls trigger at a snipe, a cooly instantly rises in the paddy fields beyond and receives the pellets in his manly bosom. When one levels one's trusty express at a herd of bounding antelope, a ryot with a yoke of oxen at once appears on the black soil in the horizon. When one goes to the range with the volunteers, a bullet is sure to hit the edge of the target and to go humming and zipzipping away into a group of fishermen on the beach. These things will happen, and therefore we have given at length (in December) the interesting case of *Stanley* v. *Powell* (1891), 1 Q.B. 86, where a beater, who lost his eye by a pellet that glanced from the branch of a tree, sued for damages. This propensity of people to get in the way of one's shot is a very old grievance, and troubled our forefathers. The earliest case is in the year book of 21 Henry VII., equivalent to A.D. 1506, before the battle of Flodden. Rede, J., remarked in the Norman jargon, which was then the language of English Courts: "*Mes ou on tire a les buts et blesse un home, coment que est incontre sa volonte, il sera dit un trespassor incontre son entent.*" In the following century was the well-known case of Abbott, Archbishop of Canterbury, who, shooting with a bow in the park, missed the deer but killed the keeper. It was gravely contended that the Archbishop had rendered himself "irregular" and incapable of performing any ecclesiastical functions.—*Indian Jurist.*

A curious case of murder was recently tried before the Kistna Sessions Court. The Kurnum of a village, with the station officer and a crowd of villagers, went to search the huts of some Yanadis for stolen property. One Yanadi was found in the huts, and in the excitement the Kurnum exclaimed, "Stab him!" A by-stander with a spear did stab him, and the unhappy Yanadi died. The Sessions Judge convicted the man who had used the spear and sentenced him to transportation for life. As for the Kurnum who exclaimed "Stab him!" the Judge held that the words may not have been seriously intended. The High Court served notice on the Kurnum to show cause why a new trial be not ordered, but, after hearing counsel on his behalf, Collins, C.J., and Weir, J., came to the conclusion that the judge's view was a possible view, and did not order a new trial. We are irresistibly reminded by this sad case of an incident that happened many, many years ago. We were out in camp with a collector, who was very sensitive to the least noise. A horse-keeper's infant cried shrilly. The collector groaned and called "Peon!" "Saheb?" replied the stalwart Dafadar, standing in the

tent doorway. "Choke that child!" said the collector. "Bahut achcha Saheb!" replied the Dafadar and disappeared. "By George! I hope he is not going to do it," said the collector.—*Ib.*

In a highly-placed official the crime of taking a bribe is one of enormous gravity, inasmuch as it tends to demoralise the whole community subject to his power and jurisdiction, and to destroy all commercial and social confidence. It is hardly too much to say of it that, in far-reaching evil effects and influences, this offence is even more noxious and atrocious than murder. It is terribly disappointing, therefore, to learn that the late Sub-Judge of Cocanada, being convicted upon his plea of guilty of taking a bribe of rupees 25,000, has been sentenced by the District Magistrate to eighteen months' simple imprisonment and a fine of rupees 1,000. The Sessions Judge should have given him three years' rigorous imprisonment and fined him half-a-lakh.—*Ib.*

At the February Sessions at Masulipatam two Yanadis were charged under section 401 with being members of a gang associated for the purpose of habitual theft. The evidence showed that this gang did commit many offences against property and had a very bad reputation, so much so that the police made a midnight raid on their camp in the jungle and succeeded in arresting these two men. The judge pointed out that they had their wives and children with them, and he expressed a doubt whether section 401 applies to a community such as this is. These Yanadis are born and bred in the gang. They know no other life. It may be that they steal, but that is an accident, as logicians would say. It is not the essential bond of union any more than theft is the purpose which assembles a community of gypsies in England. It were hard to punish a man because he has the misfortune to be born a Yanadi. The public prosecutor contended that the practice of the Godavari Sessions Court is to convict in such cases. One is reported at 6 Mad. H.C. Rep. 120. The Sessions Judge then yielded so far as to detain the two accused in custody and refer the point to the High Court under section 307, Criminal Procedure Code. The public prosecutor's citation of the practice of the Godavari Court reminds us of an anecdote we heard from Mr. J. Kelsall, late M.C.S. At the first sessions he held at Rajamundry a Yanadi was placed in the dock, the charge was read and the plea recorded. The public prosecutor then rose and said, "Your Honor, this man is a Yanadi." There was a lengthy pause, and the judge said, "Go on." Up jumped the Court Inspector: "Your Honor will permit me! Your Honor is new to this district. This man is a Yanadi. All Yanadis are thieves." "Sit down, Inspector," said the judge. "Mr. Public Prosecutor, please proceed." Then all the bar turned in their chairs and looked at this new judge, who was so ignorant as to pass lightly over the vital fact that the prisoner was a Yanadi.—*Ib.*

CARRIERS—WHAT CONSTITUTES BAGGAGE.—The case of *Oakes* v. *Northern Pacific Railway Co.*, 26 Pac. Rep. 230, decided by the Supreme Court of Oregon, is of interest on the subject of the liability of carriers for loss of baggage. It is

held that carriers of passengers are responsible for the carriage and safe delivery of such baggage as, by custom and usage, is ordinarily carried by travellers; and the payment of the usual fare includes, in legal contemplation, a compensation for the conveyance of such baggage; that they are insurers of such baggage in the same manner and to the same extent as for goods or freight; that baggage, within the rule of such liability, is confined to such articles as are usually carried as baggage, for the personal use of the passenger, or for his convenience, instruction or amusement on the journey, and does not include that which is carried for the purposes of business, such as merchandise or the like; that while the obligation of a carrier of passengers is limited to ordinary baggage, yet, if the carrier knowingly permit a passenger, either on payment or without payment of an extra charge, to take articles as personal baggage which are not properly such, it will be liable for their loss or destruction, though without fault. Lord, J., says, *inter alia:* "As to what constitutes 'baggage' in the legal sense or 'ordinary baggage,' or 'personal baggage,' as commonly used in England, it has been found by the courts difficult, if not impossible, to define with accuracy within the meaning of the rule of the carrier's liability." "It is agreed on all hands," said Earle, C.J.,, "that it is impossible to draw any very well defined line as to what is and what is not necessary or ordinary baggage for a traveller. That which one traveller would consider indispensable would be deemed superfluous and unnecessary by another. But the general habits and wants of mankind must be taken to be in the mind of the carrier when he receives a passenger for conveyance." *Phelps* v. *Railroad Co.*, 19 C.B. (N.S.) 321. In a general sense it may be said to include such articles as it is usual for persons travelling to take with them for their pleasure, convenience, and comfort, according to the habits and wants of the class to which they belong. In *Weeks* v. *Railroad Co.*, 9 Hun. 669, it is said that a passenger may carry with him "such articles of necessity and convenience as are usually carried by passengers for their personal use and comfort, instruction and convenience, or protection." In *Jordan* v. *Railroad Co.*, 5 Cush. 69, the rule is stated to be "that baggage includes such articles as are of necessity or convenience for personal use, and such as is usual for persons travelling to take with them." In *Johnson* v. *Stone*, 11 Humph. 419, the court said: "It is not practical to state with precise accuracy what shall be included by the term 'baggage.' It certainly includes articles of necessity and personal convenience usually carried by passengers for their personal use; and what these may be will very much depend upon the habits, tastes, and resources of the passenger." In *Railroad Co.* v. *Swift*, 12 Wall. 262, Mr. Justice Field said that the contract "to carry the person, only implies an undertaking to transport such a limited quantity of articles as are ordinarily taken by travellers for personal use and convenience, such quantity depending, of course, upon the station of the party, the object and length of his journey, and many other considerations." In *Macrow* v. *Railway Co.*, L.R. 6 Q.B. 612, Cockburn, C.J., said: "Whatever the passenger takes with him for his personal use and convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey, must be con-

sidered as personal luggage. This would include," he continues, " not only articles of apparel, whether for use or ornament, . . . but also the gun-case or fishing apparatus of the sportsman, the easel of the artist on a sketching tour, or the books of the student, and other articles of analogous character, the use of which is personal to the traveller, and the taking of which has arisen from the fact of his journeying. On the other hand, the term 'ordinary luggage' being thus confined to that which is personal to the passenger, and carried for his use and convenience, it follows that what is carried for the purpose of business, such as merchandise and the like, or for larger or ulterior purposes, such as articles of furniture or household goods, would not come within the description 'ordinary luggage' unless accepted as such by the carrier." See also 1 Amer. & Eng. Enc. Law. "Baggage," 1042; 2 Ror. R.R. 988; Hutch. Carr. ss. 677, 683, 686. So that it would seem that baggage, in the sense of the law, may consist of such articles of apparel as, through necessity, convenience, comfort, or recreation, the passenger may take for his personal use, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or the ultimate purpose of the journey. The question, what articles of property, as to quantity and value, contained in a trunk, may be deemed baggage within the rule, is to be determined by the jury according to the circumstances of the case, subject to the power of the court to correct any abuse. *Railroad Co.* v. *Fraloff*, 100 U.S. 24; *Bomar* v. *Maxwell*, 9 Humph. 622; *Brock* v. *Gale*, 14 Fla. 523; *Mauritz* v. *Railroad Co.*, 23 Fed. Rep. 765. As the contract of the carrier of passengers is to carry a reasonable amount of baggage for the accommodation of the passenger, it follows from the nature and object of the contract, as observed by Appleton, C.J., " that the right of a passenger is limited to the baggage required for his pleasure, convenience and necessity during the journey." *Wilson* v. *Railroad Co.*, 56 Me. 62. Articles of whatever kind that do not properly come within the description of ordinary baggage are not included within the terms of such contract, nor is the carrier liable for their loss or destruction, in the absence of negligence. Stage properties, costumes, paraphernalia, advertising matter, etc., are not articles required for the pleasure or convenience or necessity of the passenger during his journey, but are plainly intended for the larger or ulterior purposes of carrying on the theatrical business. They do not fall, therefore, under the denomination of "baggage," and in the absence of negligence, no liability can arise against the carrier for their loss or destruction unless accepted as baggage by the carrier. . . . While it is true that passenger carriers are not liable for merchandise and the like, when packed up with a traveller's baggage, if the baggage be lost, yet if the merchandise be so packed as to be obviously merchandise to the eye, and the carrier takes it without objection, he is liable for the loss. *Story, Bailm.* s. 499. Thus, in the case of *Railway Co.* v. *Shepherd*, 8 Exch. 30, Parke, B., said: " If the plaintiff had carried these articles exposed, or had packed them in the shape of merchandise, so that the company might have known what they were, and they had chosen to treat them as personal luggage, and carry them without demanding any extra remuneration, they would have been responsible for the loss. So, also, upon any limit in point

of weight, if the company chose to allow a passenger to carry more, they would be liable." And in *Marcrow* v. *Railway Co.*, *supra*, Cockburn, C.J., said: "If the carrier permits the passenger, either on payment or without payment of an extra charge, to take more than the regulated quantity of luggage, or knowingly permits him to take personal luggage articles that would not come under that denomination, he will be liable for their loss, though not arising from his negligence." In *Sloman* v. *Railway Co.*, 6 Hun. 546, Gilbert, J., after stating and citing authorities to sustain the proposition that railroad companies are not liable for the merchandise delivered to them under the guise of baggage for transportation along with a passenger, said: "They are liable if they knowingly undertake to transport merchandise in trunks or boxes, which have been received by them for transportation, in passenger trains, unless the agent who receives the packages for that purpose violates a regulation of the company by so doing, and the passenger or owner of the goods has notice of such regulations;" citing *Butler* v. *Railroad Co.*, 3 E. D. Smith, 571, and other cases. See, also, 2 Wait, Act. & Def. 82. "Doubtless," said Mitchell, J., "if the carrier had actual notice of the nature of the property, and still received it as baggage, he would be liable." *Haines* v. *Railway Co.*, 29 Minn. 161, 12 N. W. Rep. 447. So, in *Railway Co.* v. *Capps*, 16 Amer. & Eng. R. Cas. 118, it was held that where a railroad company, through its baggage or ticket agent, receives articles for transportation as baggage, knowing at the time that such articles are not properly baggage, the company will be responsible therefor as a common carrier, and will be estopped from denying that the same was baggage. *Railroad Co.* v. *Conklin* (Kan.), 3 Pac. Rep. 762; *Minter* v. *Railroad Co.*, 41 Mo. 503. *Hoeger* v. *Railway Co.*, 63 Wis. 100, 23 N.W. Rep. 435.—*Central Law Journal.*

Correspondence.

HUSBAND AND WIFE.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—Is *Re Parsons, Jones* v. *Kelland*, 14 Ont. P.R. 144, an authority that the husband, by renouncing his right to administration of the personal estate of his deceased wife, takes no interest in such estate, or that the money in court to secure dower was realty at the death of the wife, so that there being no issue the husband took no interest or estate by the curtesy, and became personalty on the death of the doweress for the purposes of distribution among the next of kin of the wife?

LAW STUDENT.

London, July 23rd, 1891.

[We are always delighted to afford the junior members of the profession any assistance in our power; but when students seek to pose us with questions, they should be careful to remember that the first duty of a lawyer is to acquire the

art of stating his case clearly and explicitly. That is what our correspondent, "Law Student," has not done. The only point for which *Re Parsons, Jones* v. *Kelland* is an authority is this, viz., that a personal representative of a deceased person is entitled to receive out of court any part of the personal estate of such deceased person which may be there, notwithstanding that some of the next of kin interested therein may be infants. So far as we can understand "Law Student's" question, we should say that the case is no authority for either proposition stated by him. The rights of the parties in the fund set apart to secure the dower upon the death of the doweress appear to have been adjudicated upon or determined in some other proceeding. So far as this decision is concerned, it seems to have been admitted that Jane Ann Jones' interest was personal estate, and as such passed to her personal representative, and the only question the judge had to decide was whether or not the infants' share should remain in court or be paid out to the personal representative.—Ed. C.L.J.]

JUDGE-MADE LAW.

To the Editor of THE CANADA LAW JOURNAL :

SIR,—Amongst the editorial comments in your issue of date 16th July last, is one charging the County Court Judge at Ottawa with going beyond his jurisdiction, and imputing mistaken zeal to a notary public. The editor must give "instant satisfaction" to these aggrieved parties by allowing them a few lines of print in their defence.

In THE LAW JOURNAL of April 16th, 1889, appeared a letter from a notary public showing the inconvenience arising from an oath of office not being taken by the notaries of Ontario, inasmuch as other commercial peoples of the world required it of their own notaries, whose duties and functions in no way differed from those of the notaries of Ontario. Also pointing out the security gained by the administering of an oath to any public functionary.

Many lawyers of Ottawa also being of opinion that notaries should be sworn, the Attorney-General of Ontario was applied to for amendment of the law in that direction; he replied that it was not expedient to alter the law, inasmuch as the functions of the notary in Ontario differed widely from those of notaries in other countries.

Issue being joined between the complainant and the legislator, the only recourse the former had was to a judge of a Court of Record, who was asked to administer an oath similar to the one administered in England to the notaries there.

The subject of debate is now shifted from the propriety of administering an oath to such functionaries to the question whether, in the silence of the statute law of Ontario on the point, it is within the jurisdiction of a county judge to make up this deficiency of the law of Ontario, which, is thought to be highly improper, unusual, and inconvenient?

Bearing in mind that the act complained of by the editor consists in the judge supplementing, modifying, or altering, if you will, a point of practice of the law and not one of its principles—which will weaken the arguments derived from the citations given below against extending the prerogative of the judge, and strengthen those in its favor—let us note some of these dicta pro and con.

"*Judicis est jus dicere, non jus dare.*" "It is the province of the statesman, not of the lawyer, to discuss, and of the legislature to determine what is best for the public good, and to provide for it by proper enactments. It is the province of the judge to expound the law only: the written from the statutes; the unwritten law from the decisions of his predecessors and of the existing courts, or from text-writers of acknowledged authority, and upon the principles to be clearly deduced from them by sound reason and just inference; it is not, however, the duty of a judge to speculate on what may be most in his opinion for the advantage of the community." (*Egerton* v. *Brownlow*, 4 House of Lords cases, cited in Broom on Common Law.)

"The judge ought to be the most obedient servant of the law, for this slavery is of more value than liberty. If the law appears to him to be defective, he must first begin by causing it to be carried out, and then proceed to bring his own observations before the head of the judiciary so as to obtain from the legislator a salutary reform. Unhappy the judges who take upon themselves to correct the law; it is not permitted to them to do better than it does, so long as it remains unchanged." (Guyot, Verbo Judge.)

On the other hand, in support of the judge's extended prerogative, we find the following newer opinions:

"Although the judge is assumed to take the law from the legislative authority, yet, as the existing law never at any time contains provisions for all cases, the judge may be obliged to invent or create principles applicable to the case. This is called by Bentham and the English jurists judge-made and judiciary law." (Encyclopædia Britannica, verbo Judge.)

"Any judge permitted to make rules he (Austin) considers to be tacitly empowered to make laws." "That judges in England can and do make law, no one can deny." "Is there any rule of law which binds him (the judge) to the decision of the case in a particular way? If there is, he must apply it whatever he or others may think of the propriety of it. But if there is not, he must still give a decision; and he will naturally decide against that party whose conduct has been unusual, or unreasonable, or dishonest, or negligent." (Elements of Law, Markby.)

"Nothing which is pernicious to utility can be right. The principle of utility, in the negative form in which I have stated it, is embodied under the name of the *argumentum ab inconvenienti* in one of the fundamental maxims of our law; and there are few principles more frequently referred to and relied upon by jurists than this. The maxim, as given by Coke, is: *Argumentum ab inconvenienti plurimum valet in lege;* and he adds: "The law, that is, the perfection of reason, cannot suffer anything that is inconvenient"; and, therefore, he says: "*Nihil quod est*

inconveniens est licitum"; and that, "judges are to judge of inconveniences as of things unlawful." (The Law of Private Rights, by George H. Smith.)

The case at length of the county and the notary is now before your readers, with the arguments in support of their action; they can only hope that these readers—as being the court of the ultimate appeal—will reverse the decision of the single judge or editor in chambers.

The importance of the office of notary is the excuse for the length and number of the articles in support of the dignity and the freedom from suspicion demanded of this official. His duties, embracing the preparation of deeds, wills, etc., and the attestation of the same, all require that the public should be protected against unscrupulous or ignorant practitioners.

A dishonest or incapable lawyer is soon found out, and his work ceases: a dishonest or incapable notary or conveyancer may ruin thousands before his incompetence or treachery is discovered.

R. J. WICKSTEED.

[We are delighted to give our enterprising friend "instant satisfaction" by publishing his letter. He is not quite correct in saying that we charged the learned judge with going beyond his jurisdiction; it was rather a suggestion that possibly he had. We would desire, however, in a feeble way, to remark that these are holiday times, and that our fighting editor is absent. "Pistols for two" are good enough in a general way, but to be fired at in this way by a gatling gun in the "dog days" is unpardonable.—ED. L.J.]

DIARY FOR AUGUST.

1. Sat.....Slavery abolished in British Empire, 1834.
2. Sun.....*10th Sunday after Trinity.*
3. Mon.....Battle of Fort William Henry, 1757.
6. Thur....Thos. Scott, 4th C.J. of Q.B., 1804.
7. Fri.....Duquesne, Governor of Canada, 1752.
8. Sat.....Last day for filing notices for Call.
9. Sun.....*11th Sunday after Trinity.* Fort William Henry capitulated, 1757.
11. Tues.....Battle of Lake Champlain, 1814.
13. Thur.....Sir Peregrine Maitland, Lieut.-Gov., 1818.
14. Fri.....Battle of Fort Erie, 1814.
16. Sun.....*12th Sunday after Trinity.* Battle of Detroit, 1812.
17. Mon.....Last day for Call and Admission notices. General Hunter, Lieut -Governor, 1799.
19. Wed.....River St. Lawrence discovered, 1535.
23. Sun.....*13th Sunday after Trinity.*
24. Mon.....St. Bartholomew.
25. Tues.....Francis Gore, Lieut.-Governor, 1806.
30. Sun.....*14th Sunday after Trinity.*
31. Mon.....Long Vacation ends.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

[June 30.

MCMICHAEL *v.* WILKIE.

Husband and wife—Separate estate—Contract by implication.

The implied obligation to pay off the incumbrance which, in the case of a conveyance of land to a person *sui juris*, is imposed by a Court of Equity is not enforcible against a married woman. It cannot be said to be a contract or promise in respect of separate property.

The practice as to giving relief to one defendant against a co-defendant considered.

Judgment of the Common Pleas Division, 19 O.R. 739, reversed.

E. D. Armour, Q.C., for the appellant.

W. H. P. Clement for the respondent.

IN RE TOWNSHIP OF ORFORD ET AL. AND TOWNSHIP OF HOWARD.

Drainage—Municipal corporations—Drain used by another municipality—R.S.O. (1887), c. 184, s. 590.

Section 590 of R.S.O. (1887), c. 184, applies only to drains strictly so called, that is, to such outlets as have been artificially constructed; and a municipality from which surface water flows, whether by drains or by natural outlets, into a natural water-course, cannot be called on to contribute to the expense of a drainage scheme, merely because the natural water-course is used as a connecting link between drains constructed under that scheme, and because the drainage scheme is in part necessitated by the large amount of surface water brought into the natural water-course by the municipality in question.

Judgment of ROBERTSON, J., affirmed.

M. Wilson, Q.C., for the appellants.

W. Douglas, Q.C., and *J. A. Walker*, for the respondents.

HAMILTON *v.* GROESBECK..

Master and servant—Negligence—Machinery—Unguarded saw—"Moving"—"Defect"—Factories Act, R.S.O. (1887), c. 208—Workman's Compensation for Injuries Act, R.S.O. (1887), c. 141.

A defect in the condition of machinery, etc., under s. 3 of the Workman's Compensation for Injuries Act, R.S.O. (1887), c. 141, means some defect with reference to the safe operation of the machine; and where a workman was injured by falling against an unguarded moving saw at a time when he was not working at it, and in such a manner that no reasonable guard would have prevented the injury, it was held that he was without remedy, and that the question whether the want of a guard might be a defect or not need not be considered.

The employer's duty, created by the Act, is merely to see that the machine is in such a condition that it may be worked with safety by a workman using reasonable care and caution.

There being no evidence as to the number of persons employed on the premises in question, the court declined to consider the questions raised as to the construction of the Factories Act, R.S.O. (1887), c. 208.

Judgment of the Queen's Bench Division, 19 O.R. 76, affirmed.

Aylesworth, Q.C., for the appellant.

J. A. S. Fraser for the respondent.

THE ATTORNEY-GENERAL EX REL. RICHARD HOBBS *v.* THE NIAGARA FALLS WESLEY PARK AND CLIFTON TRAMWAY CO.

Crown—Injunction—Breach of charter.

The defendants were incorporated by Letters Patent under the Street Railway Act, R.S.O. (1887), c. 171, which authorised them to construct and operate (on all days except Sundays) a street railway.

Held (MACLENNAN, J.A., dissenting), that an

action would not lie by the Crown to restrain the defendants from operating the road on Sunday, the restriction against their doing so being at most an implied one, and no substantial injury to the public or any interference with proprietary rights being shown.

Judgment of the Common Pleas Division, 19 O.R. 624, affirmed.

J. R. Cartwright, Q.C., and *A. M. Dymond*, for the appellant.

A. G. Hill for the respondents.

CENTRAL BANK OF CANADA *v.* GARLAND.

Bills of exchange and promissory notes—Collateral hire receipts—Discount of notes.

This was an appeal by the defendant from the judgment of the Chancery Division reported 20 O.R. 142, and came on to be heard before this court (HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A.) on the 1st of June, 1891.

G. H. Watson, Q.C., and *C. A. Masten*, for the appellant.

W. R. Meredith, Q.C., and *F. A. Hilton*, for the respondents.

June 30th, 1891. The appeal was dismissed with costs, this court agreeing with the reasons for judgment given in the court below.

UNITED COUNTIES OF LEEDS AND GRENVILLE *v.* TOWN OF BROCKVILLE.

Canada Temperance Act—Application of fines—49 Vict., c. 48, s. 2 (D).

This was an appeal by the plaintiffs from the judgment of the Queen's Bench Division reported 17 O.R. 261, and came on to be heard before this court (HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN) on the 13th of May, 1891.

W. R. Meredith, Q.C., and *J. H. Macdonald*, Q.C., for the appellants.

C. F. Fraser, Q.C., and *Aylesworth*, Q.C., for the respondents.

June 30th, 1891. The appeal was dismissed, the court being divided in opinion.

HAGARTY, C.J.O., and OSLER, J.A., thought that the appeal should be allowed for the reasons given by STREET, J., dissenting, in the court below.

MACLENNAN, J.A., agreed with the majority in the court below, while BURTON, J.A., thought that Brockville should recover, but through the medium of the Crown who should be added.

WHIDDEN *v.* JACKSON.

County Court—Jurisdiction—Equitable claim—Action—Assignments Act—R.S.O. (1887), c. 124.

An action asking for a declaration of right to rank on an insolvent estate is an action for equitable relief, and is not within the jurisdiction of the County Court.

Judgment of the County Court of Huron affirmed.

Garrow, Q.C., for the appellant.

J. H. Coyne for the respondent.

PEUCHEN *v.* CITY MUTUAL INSURANCE CO.

Insurance—Change of interest.

Where the business of a partnership is taken over by a limited liability company formed for that purpose, there is such a change of interest as to invalidate insurances held by the firm in the absence of notification of the change to, and assent by, the insurance company, though the members of the partnership hold nearly all the stock in the limited liability company.

Judgment of FALCONBRIDGE, J., reversed.

Gibbons, Q.C., for the appellants.

W. Nesbitt and *A. M. Macdonnell* for the respondents.

IN RE CENTRAL BANK OF CANADA. HOME SAVINGS AND LOAN COMPANY'S CASE.

Banks and banking — Shares — Transfers — Winding-up Act.

After a winding-up order has been made, it is too late for holders of shares, entered as such in the books of the bank, to escape liability by showing irregularities in transfers to more or less remote predecessors in title.

A loan company which advances moneys on the security of shares which are transferred to it and accepted by it in the ordinary absolute form cannot escape liability on the ground that it is merely a trustee for the borrower.

Judgment of ROBERTSON, J., affirmed.

Foy, Q.C., for the appellants.

W. R. Meredith, Q.C., and *F. A. Hilton*, for the respondents.

REGINA *v.* SLOAN.

Liquor License Act—Right of search—Refusal to admit officer—R.S.O. (1887), c. 194, s. 130.

The right of search given by section 130 of the Liquor License Act, R.S.O. (1887), c. 194, may be exercised without any preliminary state-

ment of the purpose for which the search is to be made. A formal demand of admittance is sufficient.

Judgment of the County Court of Frontenac reversed.

J. R. Cartwright, Q.C., for the appellant.

John McIntyre, Q.C., for the respondent.

GREENWOOD *v.* CROOME.

Evidence—Corroboration — Executors—R.S.O. (1887), c. 761, s. 10.

The fact of possession of certain promissory notes by one who sets up a claim to them under an alleged *donatio mortis causâ* is no corroboration of his evidence in an action by the executors of the deceased to recover back the notes, especially where for some time before his death the deceased was in a helpless condition and the claimant had free access to his papers.

Judgment of the Chancery Division affirmed.

V. Mackenzie, Q.C., and *DuVernet*, for the appellant.

Hoyles, Q.C., and *W. S. Brewster*, for the respondents.

IN RE TOWNSHIP OF ROMNEY AND TOWNSHIP OF TILBURY.

Drainage—Municipal corporations — Municipalities interested—Constitution of board of arbitrators—R.S.O. (1887), c. 184, s. 389.

Where in a drainage scheme initiated by one township assessments are made against more than one other township each township is "interested," within the meaning of section 389 of R.S.O (1887), c. 184, only in the question of its own assessment, and has no right to appoint an arbitrator to deal with other assessments.

The scheme of the Act is to make the total cost of the proposed work fall upon the initiating municipality, less such sums as may be properly chargeable against other municipalities for the benefits received by them respectively, and if benefit is disproved the attempted charge fails and does not appear to be re-imposed elsewhere.

Re Townships of Harwich and Raleigh, 20 O.R. 154, approved. *Re Essex and Rochester*, 42 U.C.R. 523, questioned.

Judgment of ARMOUR, C.J., reversed.

Atkinson, Q.C., and *C. J. Holman*, for the appellants.

W. R. Meredith, Q.C., *W. Douglas*, Q.C., and *J. A. Walker*, for the respondents.

WILLIAMS *v.* TOWNSHIP OF RALEIGH.

Drainage—Municipal corporations—Negligence —Action.

A corporation adopting and carrying out a drainage scheme without exceeding their powers and without negligence is not liable to an action for damages by one who suffers injury because of the inefficient character of the scheme.

Judgment of FERGUSON, J., reversed.

M. Wilson, Q.C., for the appellants.

W. Douglas, Q.C., and *J. A. Walker*, for the respondent.

TOWNSHIP OF STEPHEN *v.* TOWNSHIP OF MCGILLIVRAY.

Drainage—Municipal corporations—Adjoining municipality—Appeal against scheme—R.S.O. (1887), c. 184, s. 576.

An adjoining township cannot be charged under s. 576 of R.S.O. (1887), c. 184, with a proportion of the costs of drainage works which extend beyond the limits of the initiating township into the limits of a third township. It is only, if at all, when the works are done by a county council under the appropriate provisions of the Act that an adjoining township can, under such circumstances, be assessed.

Objections to the legality of a drainage scheme may be taken by way of appeal under the arbitration clauses of the Act, but they need not necessarily be so taken, and it is not too late to set them up in answer to an action.

Judgment of ROSE, J., affirmed.

Moss, Q.C., and *M. Wilson*, Q.C., for the appellants.

W. Nesbitt and *A. W. Aytoun-Finlay* for the respondents.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

Div'l Court.] [June 19.

IN RE TIPLING *v.* COLE.

Prohibition—Division Court—Judge reserving judgment without naming day — Garnishee summons—R.S.O., c. 51, s. 144.

By s. 144 of the Division Courts Act, R.S.O., c. 51, it is provided that the judge, in any case brought before him, shall openly in Court, and as soon as may be after the hearing, pronounce his decision ; but if he is not prepared to pronounce his decision instanter, he may postpone

judgment and name a subsequent day and hour for the delivery thereof in writing at the clerk's office.

Held, that this applies to the judge's decision upon the hearing of a garnishee summons; that it is a most necessary and essential provision, and a strict compliance with it should always be observed and enforced.

And where the judge reserved judgment, endorsing the summons "judgment reserved till" but did not name a subsequent day and hour for the delivery thereof, nor adjourn the hearing or trial of the cause, prohibition was granted to restrain further proceedings.

Shepley, Q.C., for the primary creditor.

Douglas Armour for the garnishee.

Appointments to Office.

SHERIFF.

County of Renfrew.

William Moffat, of the Town of Pembroke, in the County of Renfrew, Esquire, to be Sheriff in and for the said County of Renfrew, in the room and stead of William Murray, Esquire, resigned.

REGISTRAR OF DEEDS.

County of Northumberland.

Francis W. Field, of the Town of Coburg, in the County of Northumberland, Esquire, to be Registrar of Deeds in and for the Registration Division of the West Riding of the said County of Northumberland, in the room and stead of William H. Eyre, Esquire, deceased.

County of Victoria.

Charles Denroche Barr, of the Town of Lindsay, in the County of Victoria, Esquire, to be Registrar of Deeds for the said County of Victoria, in the room and stead of Hartley Dunsford, Esquire, deceased.

REFEREE.

County of Frontenac.

Byron Moffatt Britton, of the City of Kingston, in the County of Frontenac, Esquire, one of Her Majesty's Counsel learned in the law of Ontario, to be Referee under "The Drainage Trials Act," 1891 (54 Vict., cap. 51, s. 2).

POLICE MAGISTRATE.

County of Kent.

Richard Lawrence Gosnell, of the Town of Blenheim, in the County of Kent, Esquire, Barrister-at-Law, to be Police Magistrate in and for the said Town of Blenheim, without salary.

ASSOCIATE CORONERS.

County of Kent.

James Samson, of the Town of Blenheim, in the County of Kent, Esquire, M.D.

County of Oxford.

Charles Reynolds Staples, of the Village of Princeton, in the County of Oxford, Esquire, M.D.

Andrew Mackay, of the Town of Woodstock, in the County of Oxford, Esquire, M.D.

DIVISION COURT CLERK.

United Counties of Stormont, Dundas, and Glengarry.

Dougald B. McMillan, of the Township of Lochiel, in the County of Glengarry, one of the United Counties of Stormont, Dundas and Glengarry, Gentleman, to be Clerk of the Second Division Court of the said United Counties of Stormont, Dundas and Glengarry, in the room and stead of J. A. McDougald, resigned.

DIVISION COURT BAILIFFS.

United Counties of Leeds and Grenville.

Joseph Quinn, of the Village of Merrickville, in the County of Grenville, one of the United Counties of Leeds and Grenville, to be Bailiff of the Fifth Division Court of the said United Counties of Leeds and Grenville, in the room and stead of Patrick Dowdall, resigned.

County of Victoria.

Archibald J. Smith, of the Village of Woodville, in the County of Victoria, to be Bailiff of the First Division Court of the said County of Victoria, in the room and stead of Malcolm McMillan, removed from office.

County of Wellington.

William Henry Mills, of the City of Guelph, in the County of Wellington, to be Bailiff of the First Division Court of the said County of Wellington, in the room and stead of Philip Spragge, resigned.

Flotsam and Jetsam.

A FIGHT taking place immediately outside a "meeting-house," the large majority of the congregation left to witness it. Held by the Supreme Court of North Carolina that "the congregation was not disturbed by the fuss."—*State* v. *Kirby*.

AN VETERAN JUDGE.—Yesterday the Hon. Henry W. Blodgett, Judge of the National District Court and one of the Justices of the Circuit Court of Appeal, celebrated his seventieth anniversary. Judge Blodgett received his commission from President Grant in 1871. His judicial service having covered a period of twenty years, the law gives him, at the age of seventy, the privilege of retiring on full pay. But Judge Blodgett will not avail himself of that privilege. His health is good ; indeed, he never has been better equipped, mentally or physically, for the judicial service than he is now. Every secular day he makes a journey of seventy miles by rail, arriving in the city by 9 a.m. and departing for his home in Waukegan at 5 p.m., holding his court in the meantime four or five hours. It is said with truth that he is the most industrious Judge in Chicago. And yet, at the age of seventy, he realizes no need of the two or three months' vacation every summer that is necessary to enable the younger judges of the State courts to recuperate their exhausted energies. It is in this life of active occupation that the distinguished jurist finds his chief enjoyment. "I don't see how I could get on without my routine work," he says. "and the fact that I have gained the threescore and ten will not change my course at all."—*Chicago Legal Adviser.*

LITTELL'S LIVING AGE. The numbers of *The Living Age* for July 18th and 25th contain Social Aspects of American Life, and The Bombardment of Iquique, *Nineteenth Century;* Archbishop Magee, *Fortnightly;* A Diligence Journey in Spain, *National;* The Simian Tongue, *New Review;* Jewish Colonies in Spain, *Blackwood;* On the Swiss-French Frontier. *Cornhill;* Moltke as a Man of Letters, The Rise of British Dominion in India, by SIR ALFRED LYALL, and Extracts from some Unpublished Letters of Charlotte Bronte, *Macmillan;* Richard Jefferies, and The Marriage of Frances Cromwell, *Temple Bar;* Richard Jefferies, *Longman's;* The Inns of Court, *Gentleman's;* Statesmen of Europe: Austria, *Leisure Hour;* with instalments of "Two Old Men," "Melissa's Tour," "Miss Winter's Hero," and "Madame La Commandante," and poetry.

For fifty-two numbers of sixty-four large pages each (or more than 3,300 pages a year) the subscription price ($8) is low ; while for $10.50 the publishers offer to send any one of the American $4.00 monthlies or weeklies with *The Living Age* for a year, both postpaid. Littell & Co., Boston, are the publishers.

Law Society of Upper Canada.

THE LAW SCHOOL, 1891.

LEGAL EDUCATION COMMITTEE.

CHARLES MOSS, Q.C., *Chairman.*

W. BARWICK. E. MARTIN, Q.C.
JOHN HOSKIN, Q.C. W. R. MEREDITH, Q.C.
Z. A. LASH, Q.C. W. R. RIDDELL.
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F. MACKELCAN, Q.C. C. ROBINSON, Q.C.
J. V. TEETZEL, Q.C.

This notice is designed to afford necessary information to Students-at-Law and Articled Clerks, and those intending to become such, in regard to their course of study and examinations. They are, however, also recommended to read carefully in connection herewith the Rules of the Law Society, copies of which may be obtained from Principal of the Law School, Osgoode Hall, Toronto.

Those Students-at-Law and Articled Clerks, who, under the Rules, are required to attend the Law School during all the three terms of the School Course, will pass all their examinations in the School, and are governed by the School Curriculum only. Those who are entirely exempt from attendance in the School will pass all their examinations under the existing Curriculum of The Law Society Examinations as heretofore. Those who are required to attend the School during one term or two terms only will pass the School Examination for such term or terms, and their other Examination or Examinations at the usual Law Society Examinations under the existing Curriculum.

Provision will be made for Law Society Examinations under the existing Curriculum as formerly for those students and clerks who are wholly or partially exempt from attendance in the Law School.

Each Curriculum is therefore published herein accompanied by those directions which appear to be most necessary for the guidance of the student.

CURRICULUM OF THE LAW SCHOOL, OSGOODE HALL, TORONTO.

Principal, W. A. REEVE, M.A. Q.C.

Lecturers: E. D. ARMOUR, Q.C.
A. H. MARSH, B.A., LL.B., Q.C.
R. E. KINGSFORD, M.A., LL.B.
P. H. DRAYTON.

The School is established by the Law Society of Upper Canada, under the provisions of rules passed by the Society with the assent of the Visitors.

Its purpose is to promote legal education by affording instruction in law and legal subjects to all Students entering the Law Society.

The course in the School is a three years' course. The term commences on the fourth Monday in September and closes on the first Monday in May; with a vacation commencing on the Saturday before Christmas and ending on the Saturday after New Year's Day.

Students before entering the School must have been admitted upon the books of the Law Society as Students-at-Law or Articled Clerks. Admission is to be gained during Easter and Trinity terms only. The steps required to procure such admission are provided for by the rules of the Society, numbers 126 to 141 inclusive.

The School term, if duly attended by a Student-at-Law or Articled Clerk is allowed as part of the term of attendance in a Barrister's chambers or service under articles.

The Law School examinations at the close of the School term, which include the work of the first and second years of the School course respectively, constitute the First and Second Intermediate Examinations respectively, which by the rules of the Law Society, each student and articled clerk is required to pass during his course; and the School examination which includes the work of the third year of the School course, constitutes the examination for Call to the Bar, and admission as a Solicitor.

Honors, Scholarships, and Medals are awarded in connection with these examinations. Three Scholarships, one of $100, one of $60, and one of $40, are offered for competition in connection with each of the first and second year's examinations, and one gold medal, one silver medal, and one bronze medal in connection with the third year's examination, as provided by rules 196 to 205, both inclusive.

The following Students-at-Law and Articled Clerks are exempt from attendance at the School.

1. All Students-at-Law and Articled Clerks attending in a Barrister's chambers or serving under articles elsewhere than in Toronto, and who were admitted prior to Hilary Term, 1889.

2. All graduates who on the 25th day of June, 1889, had entered upon the *second* year of their course as Students-at-Law or Articled Clerks.

3. All non-graduates who at that date had entered upon the *fourth* year of their course as Students-at-Law or Articled Clerks.

In regard to all other Students-at-Law and Articled Clerks, attendance at the School for one or more terms is compulsory as provided by the Rules numbers 155 to 166 inclusive.

Any Student-at-Law or Articled Clerk may attend any term in the School upon payment of the prescribed fees.

Students and clerks who are exempt, either in whole or in part, from attendance at The Law School, may elect to attend the School, and to pass the School examinations, in lieu of those under the existing Law Society Curriculum. Such election shall be in writing, and, after making it, the Student or Clerk will be bound to attend the lectures, and pass the School examination as if originally required by the rules to do so.

A Student or Clerk who is required to attend the School during one term only, will attend during that term which ends in the last year of his period of attendance in a Barrister's Chambers or Service under Articles, and will be entitled to present himself for his final examination at the close of such term in May, although his period of attendance in Chambers or Service under Articles may not have expired. In like manner those who are required to attend during two terms, or three terms, will attend during those terms which end in the last two, or the last three years respectively of their period of attendance, or Service, as the case may be.

Every Student-at-Law and Articled Clerk before being allowed to attend the School, must present to the Principal a certificate of the Secretary of the Law Society shewing that he has been duly admitted upon the books of the Society, and that he has paid the prescribed fee for the term.

The Course during each term embraces lectures, recitations, discussions, and other oral

methods of instruction, and the holding of moot courts under the supervision of the Principal and Lecturers.

During his attendance in the School, the Student is recommended and encouraged to devote the time not occupied in attendance upon lectures, recitations, discussions or moot courts, in the reading and study of the books and subjects prescribed for or dealt with in the course upon which he is in attendance. As far as practicable, Students will be provided with room and the use of books for this purpose.

The subjects and text-books for lectures and examinations are those set forth in the following Curriculum :

FIRST YEAR.

Contracts.

Smith on Contracts.
Anson on Contracts.

Real Property.

Williams on Real Property, Leith's edition.

Common Law.

Broom's Common Law.
Kerr's Student's Blackstone, Books 1 and 3.

Equity.

Snell's Principles of Equity.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

SECOND YEAR.

Criminal Law.

Kerr's Student's Blackstone, Book 4.
Harris's Principles of Criminal Law.

Real Property.

Kerr's Student's Blackstone, Book 2.
Leith & Smith's Blackstone.
Deane's Principles of Conveyancing.

Personal Property.

Williams on Personal Property.

Contracts and Torts.

Leake on Contracts.
Bigelow on Torts—English Edition.

Equity.

H. A. Smith's Principles of Equity.

Evidence.

Powell on Evidence.

Canadian Constitutional History and Law.

Bourinot's Manual of the Constitutional History of Canada. O'Sullivan's Government in Canada.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to the above subjects as shall be prescribed by the Principal.

THIRD YEAR.

Contracts.

Leake on Contracts.

Real Property.

Dart on Vendors and Purchasers.
Hawkins on Wills.
Armour on Titles.

Criminal Law.

Harris's Principles of Criminal Law
Criminal Statutes of Canada.

Equity.

Lewin on Trusts.

Torts.

Pollock on Torts.
Smith on Negligence, 2nd edition

Evidence.

Best on Evidence.

Commercial Law.

Benjamin on Sales.
Smith's Mercantile Law.
Chalmers on Bills.

Private International Law.

Westlake's Private International Law.

Construction and Operation of Statutes.

Hardcastle's Construction and Effect of Statutory Law.

Canadian Constitutional Law.

British North America Act and cases thereunder.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

During the School term of 1890-91, the hours of lectures will be 9 a.m., 3.30 p.m., and 4.30 p. m., each lecture occupying one hour, and two lectures being delivered at each of the above hours.

Friday of each week will be devoted exclusively to Moot Courts. Two of these Courts will be held every Friday at 3.30 p.m., one for the Second year Students, and the other for the Third year Students. The First year Students will be required to attend, and may be allowed to take part in one or other of these Moot Courts.

Printed programmes showing the dates and hours of all the lectures throughout the term, will be furnished to the Students at the commencement of the term.

GENERAL PROVISIONS.

The term lecture where used alone is intended to include discussions, recitations by, and oral examinations of, students from day to day, which exercises are designed to be prominent features of the mode of instruction.

The statutes prescribed will be included in and dealt with by the lectures on those subjects which they affect respectively.

The Moot Courts will be presided over by the Principal or the Lecturer whose series of lectures is in progress at the time in the year for which the Moot Court is held. The case to be argued will be stated by the Principal or Lecturer who is to preside, and shall be upon the subject of his lectures then in progress, and two students on each side of the case will be appointed by him to argue it, of which notice will be given at least one week before the argument. The decision of the Chairman will be pronounced at the next Moot Court, if not given at the close of the argument.

At each lecture and Moot Court the roll will be called and the attendance of students noted, of which a record will be carefully kept.

At the close of each term the Principal will certify to the Legal Education Committee the names of those students who appear by the record to have duly attended the lectures of that term. No student will be certified as having duly attended the lectures unless he has attended at least five-sixths of the aggregate number of lectures, and at least four-fifths of the number of lectures of each series during the term, and pertaining to his year. If any student who has failed to attend the required number of lectures satisfies the Principal that such failure has been due to illness or other good cause, the Principal will make a special report upon the matter to the Legal Education Committee. For the purpose of this provision the word "lectures" shall be taken to include Moot Courts. Examinations will be held immediately after the close of the term upon the subjects and text books embraced in the Curriculum for that term.

The percentage of marks which must be obtained in order to pass any of such examinations is 55 per cent. of the aggregate number of marks obtainable, and 29 per cent. of the marks obtainable on each paper.

Examinations will also take place in the week commencing with the first Monday in September for students who were not entitled to present themselves for the earlier examination, or who having presented themselves thereat, failed in whole or in part.

Students whose attendance at lectures has been allowed as sufficient, and who have failed at the May examinations, may present themselves at the September examinations at their own option, either in all the subjects, or in those subjects only in which they failed to obtain 55 per cent. of the marks obtainable in such subjects. Students desiring to present themselves at the September examinations must give notice in writing to the Secretary of the Law Society, at least two weeks prior to the time fixed for such examinations, of their intention to present themselves, stating whether they intend to present themselves in all the subjects, or in those only in which they failed to obtain 55 per cent. of the marks obtainable, mentioning the names of such subjects.

Students are required to complete the course and pass the examination in the first term in which they are required to attend before being permitted to enter upon the course of the next term.

Upon passing all the examinations required of him in the School, a Student-at-Law or Articled Clerk having observed the requirements of the Society's Rules in other respects becomes entitled to be called to the Bar or admitted to practise as a Solicitor without any further examination.

The fee for attendance for each Term of the Course is the sum of $10, payable in advance to the Secretary.

Further information can be obtained either personally or by mail from the Principal, whose office is at Osgoode Hall, Toronto, Ontario.

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IT is of great importance that the rule of contributory negligence, founded as it is on reason and common sense, should not be hampered by artificial interpretations, and it is for this reason that we note with satisfaction the recent decision, in Ohio, of *Penn. Co.* v. *Langdorff* (26 Week. Law Bull. 29), following and affirming in broad terms other similar but more restricted decisions in other States of the Union. In the case in question a little girl wandered on to a railroad crossing in view of an approaching train. The child's nurse, who was conversing with the defendant near by, called to the child, and while it was returning in answer to the call it tripped and fell upon the track. The defendant, seeing the train rapidly approaching and the danger of the child, sprang to its rescue and, seizing it, rushed forward, but he was not clear of the track before the train struck him, producing injuries for which he claimed compensation. The Court held "the act of the defendant in error was not only lawful, but it was highly commendable; nor was he in any legal sense responsible for the emergency that called for such prompt decision and rapid execution," and adopted the language of their Court of Appeals in a similar case (*Eckert* v. *Railroad Co.*, 43 N.Y. 502), that "the law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under circumstances constituting rashness in the judgment of prudent persons"; and it concludes by saying that under such circumstances "it would be unreasonable to require a deliberate judgment from one in a position to afford relief. To require one so situated to stop and weigh the danger to himself of an attempt to rescue another, and compare it with that overhanging the person to be rescued, would be in effect to deny the right of rescue altogether if the danger was imminent." The ruling seems to us to be in accord with the principles of both justice and common sense.

THE VALUES OF HUMAN LIMBS, CHIEFLY WELSH.

Much of the time of courts and juries nowadays is taken up in considering and deciding the pecuniary compensation to be given for injuries to, and losses of, various parts and members of the human form divine owned by men, women, or children; and great is the diversity of decisions. One gets as much for a little finger as another does for a whole leg; a third persuades a sympathetic jury that his great toe is of greater worth than number four's nose. Notwithstanding *interest reipublicæ ut sit finis litium* there is no finality, no golden rule, fixed and immovable; so that a poor practitioner, when consulted, can never say with any

certainty what damages a lady will get for a broken limb, or a man for the loss of his hair. One man in New York got $12,000 from a jury for a broken leg, and kept the amount; while another, in the same state, was awarded only $6,000, and yet the court would not let him keep it, thinking it too much. In Iowa the judges thought $2,500 quite enough for such a limb, although the jurors had said $4,000. Another New Yorker, who had used his leg for forty-one years, got $13,500 for it, and the judges let him retain $7,000. In Ontario when men were scarcer than at present, a jury gave £6178 for a leg; but the judges of the Court of Common Pleas said, "No, about £500 is enough." A Massachusetts lady only got $5,000 for a similar limb, and yet it is generally supposed that ladies' legs are of finer material than the ordinary male stilt: *Rockwell* v. *3rd Avenue Railway*, 64 Barb. (N.Y.) 430; *Clapp* v. *Hudson Ry.*, 19 Barb. 461; *Lombard* v. *Ch., etc., Railway*, 47 Iowa 494; *Copping* v. *N.Y.C., etc.*, 48 Hun. 292; *Batchelor* v. *B. & B. Railway*, 5 C.P. 127; *Feetal* v. *Middlesex Railway*, 109 Mass. 290.

It was much better arranged in the old days, when Howel the Good lorded it over the principality of Wales, or a part thereof. He first promulgated his laws in 914, and they prevailed until the independence of Wales came to an end nearly at the close of the thirteenth century. We have them now chiefly in three versions—the Venedotian, the Dimetian, and the Gwentian codes. Under these codes almost every part of the human body was valued, and, when an injury was done, no time had to be spent in assessing damages; the wrong proved, definite compensation had to be given. The nose and each hand, each foot, each eye, each lip, was worth six kine and six score of silver; "the worth of the ear, if it be cut off, two kine and two score of silver separately; if injured so as to cause deafness, six kine and six score of silver" (Ven. C. Bk. iii. 8 ch. xxii.). Howel tells us that the full worth of a cow in his day was three score pence, and Prof. Rogers says that in 1290 the average price of cows was seven and six pence; money then was worth at least twelve times what it is now.

"The tongue itself is equal to the worth of all the other members, because it defends them." So say all the codes. "The worth of one of the small toes is a cow and a score of silver; but that of one of the great toes, two kine and two score of silver." The Venedotian code says: "The worth of a finger is a cow and one score of silver; that of the thumb twice as much; while that of the thumb-nail is thirty pence; that of the upper joint of the finger, twenty-six pence and a half-penny and a third of a half-penny; that of the middle joint, thirty-three pennies and two-thirds of a penny; that of the lowest joint four pence." The Gwentian code, however, makes no distinction between the thumb-nail and any other nail, and puts up the middle joint of the finger to two score and ten pence, a half-penny and two parts of a half-penny; and the nearest joint to four score of silver. The Venedotian code is high in its estimation of teeth. (Perhaps the editor had arrived at that period when, as the preacher hath it, "the grinders cease because they are few.") It says, "the worth of each of the teeth is a cow and one score of silver; the worth of each of the fang teeth, two kine and two score of silver, because they are the guards of the teeth." "The full worth of all the members of the human body, when taken together, is four score

and eight pounds. The proverb says, "Comparisons are odious," still they are often interesting and useful; let us make some by giving extracts from "the laws of Alfred"; in these we read, "If a man strike off another's nose, let him make 'bot' (*i.e.*, pay a fine) with lx shillings. If a man strike out another's tooth in the front of his head, let him make 'bot' for it with viii shillings; if it be the canine tooth, let iv shillings be paid as 'bot.' A man's grinder is worth xv shillings. If a man strike out another's eye, or his hand or his foot off, there goeth like 'bot' to all: vi pennies, and vi shillings, and lx shillings, and the third part of a penny. If the thumb be struck off, for that shall be xxx shillings as 'bot.' If the great toe be struck off, let xx be paid him as 'bot'; if it be the second toe, xv; if the middlemost toe, ix; if the fourth toe, vi shillings; if the little toe, let v shillings be paid him. If a man's tongue be done out of his head by another man's deeds, that shall be like as eye 'bot.'" (Alf. 64, 46, 49, 71, 56, 64, 52.)

Years before Alfred and about the first decade of the seventh century Aethelbirht, King of Kent, set forth his laws, or dooms, and among them we find, "If the nose be pierced, let 'bot' be made with ix shillings; if it be one 'ala' let 'bot' be made with iii shillings; if both be pierced, let 'bot' be made with vi shillings; if the nose be otherwise mutilated, for each let 'bot' be made with vi shillings. For each of the four front teeth, vi shillings; for the tooth that stands next to them, iv shillings; for that which stands next to that, iii shillings; and then afterwards for each a shilling. If a thumb be struck off, xx shillings. If a thumb-nail be off, let 'bot' be made with iii shillings. If the shooting (*i.e.*, fore) finger be struck off, let 'bot' be made with viii shillings; if the middle finger be struck off, iv shillings; if the gold (*i.e.*, ring) finger, vi shillings; if the little finger, xi shillings; for every nail, a shilling. If a great toe be cut off, let ten shillings be paid; for each of the other toes, let one-half be paid, like as it is stated for the fudgers." (The Laws of King Aethelbirht, 45, 46, 47, 48, 51, 54, 70, 71.) The Frisian laws are equally as particular as to all the possible injuries which can affect the nose (Asega-Buch, p. iii. 2, 5.) The Welsh laws seem to exceed all others in particularity of details for personal injuries.

The value of thumbs in England is, at the present time, a matter of doubt. Jackson was awarded £50 by a jury, while Richardson and Maddox were only allowed £20 each for injuries to the same member; but in all three cases the judges had objections, and overruled the verdicts: *Jackson* v. *Metropolitan Ry.*, 3 App. Cas. 193; *Richardson* v. *Metropolitan Ry.*, 37 L.J., C.P. 300; *Maddox* v. *London, C. & D. Ry.*, 38 L.T. 450. Out in Kansas, the jurors, with true western liberality, said that Peavey ought to have $6,500 for the loss of a thumb and forefinger, but the court would not agree to it: *Kansas Pac. Ry.* v. *Peavey*, 34 Kan. 472.

But to return to our Welsh rare-bits, "Twenty-four pence" (we are told) "is the worth of the blood of every kind of persons; thirty pence was the worth of the blood of Christ; and it is unworthy to see the blood of God and the blood of man appraised of equal worth; and therefore the blood of man is of less worth" (Dim. Code, Bk. ii, ch. 17).

"The worth of a conspicuous scar upon a person's face is six score pence;

if it be upon his hand, three score pence is to be paid; thirty pence is to be paid if it be upon the foot. If a person be struck upon his head so that the brain be seen, or if he be stabbed in the body, so that the bowels come out, or if the thigh bone, or the arm bone, of a person be broken, for each three pounds are to be paid him; for he is in danger of his life by every one of them" (Dim. Code).

The following had to be paid to a wounded person for whom it was necessary to have medical aid, besides his saraad (*i.e.*, fine for the insult or injury): "Four pence for a pan to prepare medicaments for him; four pence for tallow; a penny for his light nightly; a penny for the food of the mediciner daily; and a penny for the food of the wounded daily" (Dim. Code). For a broken bone of the cranium, four pence had to be paid, "unless," as the Vendotian Code saith, "there be a dispute as to its diminutiveness; and if there be a dispute as to its size, let the mediciner take a brass basin, and let him place his elbow on the ground, and his hand over the basin; if its sound be heard (as it falls), let four legal pence be paid; and if it is not heard, nothing is due." Head bones have gone up since those days. Hanson had the external table of his skull cracked by an iron poker, held by a brakesman, and the railway company had to pay him $4,000 (62 Maine 84).

By the way, the position, duties, and remuneration of the physician or mediciner were clearly defined in those days; he had his land free, his linen clothing from the queen, and his woollen clothing from the king. He had to administer medicine gratuitously to all within the palace, and to the chief of the king's household; for these services he got nothing except the bloody clothes, unless it was for one of the three dangerous wounds. He was entitled to take an indemnification from the kindred of the wounded person, in case he might die from the remedy used; if he did not take it, he had to answer for the deed. His daily food was worth one penny half-penny; and his fee for an application of red ointment was twelve pence; for applying herbs to a swelling, four pence; and for letting blood, the same (Ven. Cod., Bk. I., ch. 8).

The Gwentian code was more particular about eyelids than the others, which appear to be silent concerning them. It reads, "The worth of a person's eyelid, should hair be thereon, is one legal penny in value for every hair; if a part of it be cut away, the worth of a conspicuous scar is paid" (*i.e.*, six score pence).

Hair was valued excessively, we humbly submit, by the Dimetians. The Venedotian code simply said: "The worth of hair plucked from the roots: a penny for every finger used in plucking it out, and two pence for the thumb, and two pence for the hair." The Dimetian Code, however, said, "A legal penny for every hair pulled by the root from the head, and twenty-four pence for the front hair." Even the hair of a horse was regarded: "Whoever shall borrow a horse and chafe its back so as to cause an ugly loss of its hair is to pay four legal pence to the owner" (Dim. Code, Bk. ii, ch. 28, sec. 28). The mane of a horse was the same worth as his bridle—that is, four legal pence (Ven., Bk. iii, ch. iv., 18). Whoever cut off the tail hair of a horse had to put the animal in a place where it should not be seen, and had to give another horse in lieu of it to the owner, and had to keep the injured nag until its tail had grown as well as ever, it re-

maining idle meanwhile (Ven., Bk. iii, ch. iv, s. 17). Verily, this was akin to tarrying at Jericho until one's beard is grown. The robbing a man of his beard was, among the Saxons, punishable by a fine of twenty shillings; to shave one like a priest was punishable by a fine of thirty shillings, and to bind him as well as shave him increased the fine to forty shillings (Alfred 35). *Per contra*, in the days of the virgin Queen Elizabeth every beard above a fortnight's growth was subject to a tax of three shillings and four pence, under a law passed in the first year of Her Majesty's reign.

Strangely enough, we are told that "the law says that the limbs of all persons are of equal worth; if a limb of the King be broken, then it is of the same worth as the limb of a villain; yet nevertheless the worth of a saraad to the King or to a breyer (freeman) is more than the saraad of a villain, if a limb belonging to him be cut" (Dim. Code). (The chapters concerning the members of the human body are as follows: Venedotian Code, Bk. III, ch. 23; Dimetian Code, Bk. II, ch. 67; and Gwentian Code, Bk. II, chs. 6 and 7.)

A most important part of the knowledge required of a judge in those days was the worth of wild and tame animals; and Howel and his wise men denounced their malediction and that of all the Cymry upon the judge who should undertake the judicial function (and even upon the lord who might confer it upon him) without knowing these things. We are given, in full detail, the value of horses, kine and swine, sheep and goats, cats and dogs, geese and hawks, fowl and bees, whether male or female, little and big, young, old, or middle-aged: *e.g.*, a hen was a penny, a cock two pennies, a chicken a farthing until it could roost, then a half-penny until it should lay or crow, and after that full price. A foal was worth four pence for the first fourteen days of its life; then to the end of its first year twenty-four pence, forty pence during its second year, and sixty pence during its third year. (Ven., Bk. iii, chs. 4 and 13.) Trees, too, and furniture, are valued in detail.

Some of the critical readers of THE CANADA LAW JOURNAL (and they are legion) may object to my rendering of some of these laws of Howel Dha. We may admit that there may be weaknesses in our version—though we know them not—but who can make anything better than "The worth of a finger, a cow, and one score of silver" out of the Venedotian, "Guerth bys clan buch ac vgeyn aryant," or the Dimetian, "Goerth bysdyn buch ac vgeint aryant atal," or even the Gwentian "Gwerth bys dyn buoch ac ugeint aryant."

R.V.R.

COMMENTS ON CURRENT ENGLISH DECISIONS.

The Law Reports for July comprise (1891) 2 Q.B., pp. 1-212: (1891) P., pp. 257-294; (1891) 2 Ch., pp. 185-415; and (1891) A. C., pp. 81-296.

INNKEEPER, LIABILITY OF, FOR LOSS OF GUEST'S PROPERTY—ONUS OF PROOF—EVIDENCE—26 & 27 VICT., C. 41, S. 1—(R.S.O., C. 154, S. 3).

Medawar v. *Grand Hotel Co.* (1891), 2 Q.B. 11, was an action against a hotel company for the loss of goods. The plaintiff arrived at the hotel early in the

morning, and found it full, but he was informed that he could have the temporary use of a room, which was to be occupied by a lady and gentleman later in the day. His luggage was accordingly placed in this room, and for the purpose of washing and dressing he took out from his dressing-bag a stand containing brushes and other articles of the toilet, which he placed on the dressing-table. After completing his toilet, he went downstairs to the coffee-room, leaving the stand on the dressing-table and the door of the room unlocked; and after having breakfast, left the hotel, and did not return till midnight. On the arrival of the lady and gentleman, who had engaged the room which the plaintiff had used, the plaintiff's luggage, including the stand, were, by direction of the head porter, placed in the corridor, where they remained until the plaintiff's return. On his arrival, he was provided with another room, into which his luggage was brought from the corridor. The next morning the plaintiff discovered that some trinkets, which he had left in the drawer of the stand, had been stolen. There was no evidence to show whether they had been stolen while the stand was in the corridor or in either of the bedrooms. A. L. Smith, J., under these circumstances, held that the plaintiff could not recover, and dismissed the action on the ground that the plaintiff had failed to prove that the loss had occurred while the things were in the corridor; but, on appeal, the majority of the Court (Lord Esher, M.R., and Bowen, L.J.) were of opinion that the plaintiff was received as a guest at the hotel, and that the relation of innkeeper and guest continued until a reasonable time after the plaintiff's goods had been placed in the corridor, and that, if the trinkets were stolen while the goods were in the bedroom, there was contributory negligence on the part of the plaintiff; but that if they were stolen while they were in the corridor, the loss was due solely to the defendants. But, inasmuch as it was not proved whether the trinkets were stolen in the bedroom or the corridor, the defendants were liable up to the amount of £30 (under R.S.O., c. 154, s. 3, the amount is $40), because they could not discharge the onus which lay on them of showing that the plaintiff's negligence had contributed to the loss; and that for the like reason the plaintiff could not recover more than the £30, because he could not prove that the loss had occurred "through the wilful act, default, or neglect of the innkeeper, or any servant in his employ." But Fry, L.J., was of opinion the relation of innkeeper and guest did not exist when the loss occurred, and for that reason that the plaintiff should fail.

LANDLORD AND TENANT—LEASE—COVENANT TO DELIVER UP PREMISES IN REPAIR, BREACH OF—MEASURE OF DAMAGES.

In *Joyner* v. *Weeks* (1891), 2 Q.B. 31, the question discussed is the measure of damages to which a covenantee is entitled for breach of a covenant in a lease to deliver up the premises in repair. In this case the lessor had made a lease to another lessee from the expiration of the defendant's term, and under this new lease the defendant was to put, and did put, the premises in repair; and it was contended on behalf of the defendant that the plaintiff was therefore not damnified by the defendant's breach of his covenant, and was only entitled to nominal damages; and a referee, to whom the cause was referred, so held. But a Divi-

sional Court (Wills and Wright, JJ.) held this to be wrong, but were of opinion that the proper measure of damages was the diminution in value of the property, and they therefore directed a new trial. On appeal, Lord Esher, M.R., and Fry, L.JJ., although adopting the law of the Divisional Court on the main point, disagreed with them as to the measure of damages, and set aside the order for a new trial and gave judgment for the plaintiff for the amount which had been proved to be the cost of making the repairs. The measure of damages in such cases Lord Esher declares to be the cost of making the repairs; and this rule, he inclines to think, is not merely a discretionary rule, but a rule of law.

PRACTICE—JUDGMENT CREDITOR—RECEIVERSHIP ORDER, EFFECT OF—EQUITABLE EXECUTION—PRIORITY.

Levasseur v. *Mason* (1891), 2 Q.B. 73, was an issue to determine the right to the proceeds of certain goods. The defendants in the issue were execution creditors of a French company, which had certain property in England in the hands of an English firm, who had a lien on it. The execution creditors obtained an order appointing a receiver of the company's interest in these goods. After this order was made the company was adjudicated bankrupt in France, and the plaintiffs in the issue were appointed liquidators. They then put in a claim to the goods, which, by an order of the Court, were subsequently directed to be sold, and the proceeds, after paying the lien, were paid into Court by the receiver. The Court of Appeal (Lord Coleridge, C.J., Lord Esher, M.R., and Fry, L.J.), affirming Day, J., held that, assuming that the liquidators at the date of the liquidation became by the law of France entitled to the goods, yet the case must be determined by English law, and under that law the receivership order had the effect of entitling the execution creditors to the goods, or the proceeds of them, as from the date upon which it was made, subject only to the discharge of the lien, which was a legal impediment to their execution, and therefore that the execution creditors were entitled to the proceeds.

PRACTICE—SERVICE OF WRIT—ACTION AGAINST FOREIGN FIRM—ISSUE OF WRIT AGAINST DEFENDANTS IN FIRM NAME—SERVICE ON PARTNER RESIDENT WITHIN JURISDICTION—RULES 53, 64-70—(ONT. RULES 232, 265, 271-2).

In *Heinemann* v. *Hale* (1891), 2 Q.B. 83, the Court of Appeal put the finishing stroke to their decisions on the practice as to suing partners of a firm residing and carrying on business out of the jurisdiction by holding squarely that the rules do not admit of such a firm being sued by the firm name, nor permit of the members being served by service on one of their number, who may happen to be within the jurisdiction, and that a writ so issued is irregular, even as against a partner served within the jurisdiction. In England new rules have been promulgated on the subject of suing partners, which may be found in the current volume of the *Law Times Journal* at page 200.

PRACTICE—SERVICE OF NOTICE OF WRIT ON FOREIGN FIRM—RULES 69, 70 (ONT. RULES 265, 266, 232, 272).

Dobson v. *Festi* (1891), 2 Q.B. 92, is another case in the same line as the last. In this case the defendants were a foreign firm sued in their firm name, and notice

of the writ had been served on one of the partners abroad; and the plaintiff on this service claimed to be entitled, on default of appearance, to sign judgment against the firm. This was refused by Cave and Grantham, JJ., and their decision was affirmed by the Court of Appeal (Lindley, Lopes, and Kay, L.JJ.), because the rules allowing service of partners by serving one of their number do not apply to foreign firms.

NUISANCE—SMELTING WORKS—RIGHT OF LOCAL BOARD TO ACT AS RELATORS IN RESPECT OF PUBLIC NUISANCE.

Attorney-General v. *Logan* (1891), 2 Q.B. 100, was an action by the Attorney-General upon the relation of a municipal corporation to abate a nuisance, and also by the relator for damages to the relator's park, in which questions of law were raised on the pleadings,—First, whether the municipal body could properly be relators; secondly, whether they were entitled to sue for damages occasioned by the alleged nuisance. As to the first point, the Court (Wills and V. Williams, JJ.) were of opinion that the case was one in which the Attorney-General was entitled to file an *ex officio* information, and that there was no difference between an information filed *ex officio* and a proceeding by relation, except as to costs, which, in the latter case, the relator assumes responsibility for. Furthermore, in the present case the local board, as the owners of a park, the trees and shrubs of which were injured by the alleged nuisance, were entitled to recover damages therefor. And although under the Public Health Act it was provided that nothing in that Act "should be construed to extend to . . . the smelting of ores and minerals, etc., so as to obstruct or interfere with any of such processes" —although the local board might not be able to take summary proceedings to abate nuisances arising from smelting ores and minerals, they nevertheless were not deprived of their common law remedy, as owners of property, to bring an action to recover damages for nuisance so occasioned.

STATUTE—CONSTRUCTION—PENALTY.

In *Barlow* v. *Terrett* (1891), 2 Q.B. 107, under a statute relating to the removal of nuisances, and which provided for the seizure and destruction of unsound meat exposed or deposited for sale, and imposed a penalty upon "the person to whom such meat belongs or did belong at the time of sale or exposure for sale, or in whose possession or on whose premises the same is found," the appellant was convicted as being the owner of unsound meat which had been deposited for sale, but which had not in fact been sold or exposed for sale. The Court (Day and Lawrance, JJ.) quashed the conviction, holding that there must be a sale or exposure for sale in order to warrant the infliction of the penalty; and that the loss of the meat was the only consequence where there had been neither an actual sale nor exposure for sale.

STATUTE—CONSTRUCTION—MEANING OF "LOPPING" TREES.

In *Unwin* v. *Hanson* (1891), 2 Q.B. 115, the sole question that had to be decided was the proper construction of a statute authorizing justices of the peace to direct trees growing near a highway to be "pruned or lopped." The trees

in question had been "lopped," and the question was whether that was within the statute; and it was held that it was not, that "lopping" means cutting off branches laterally.

CRIMINAL LAW—EXTRADITION—EMBEZZLEMENT OR MISAPPROPRIATION—FRAUD BY BAILEE OR AGENT—SUFFICIENCY OF WARRANTS.

In re Bellencontre (1891), 2 Q.B. 122, was an application by a prisoner, committed for extradition to France, to be discharged from arrest. Two points were raised: the first as to the sufficiency of the French and English warrants for his arrest; and, secondly, whether the offence charged was an offence for which he was extraditable. The French warrant was issued on a charge of embezzling or misappropriating money as a notary; and the English warrant under which he was arrested described him as accused of the crime of fraud by a bailee, and fraud as an agent. The French warrant specified nineteen separate charges, and the Court came to the conclusion that fifteen of them disclosed no crime, such as if committed in England would be pnnishable by English law. With regard to the other four charges, there was evidence that in each case money was entrusted to the prisoner as a notary, without any direction in writing, with a view to reinvestment as soon as he or his customer should have found a suitable investment, and that he had misappropriated such money. As to the first point, the Court (Cave and Wills, JJ.) were of opinion that the offences were sufficiently described in both the French and English warrants, and that the warrants were consistent with each other, and that as to the four charges above-mentioned there was evidence that the offences charged were offences within both the French and also, if committed in England, within English law (24 & 25 Vict., c. 96, s. 76), and, therefore, that the prisoner was properly committed for extradition. Wills, J., shortly sums up the effect of the Extradition Act (33 & 34 Vict., c. 52) as follows, viz.: It requires "that the person whose extradition is sought should have been accused in a foreign country of something which is a crime by English law, and that there should be a *prima facie* case made out that he is guilty of a crime under the foreign law and also of a crime under English law"—of course what he means is, that the crime charged must be one which is actually a crime under the foreign law, and would be a crime under English law if it had been committed in England. When these conditions are satisfied, then the extradition ought to be granted.

CRIMINAL LAW—CRIMINAL LAW AMENDMENT ACT, 1885 (48 & 49 VICT., C. 69), S. 4—CARNAL KNOWLEDGE OF GIRL UNDER 13 YEARS—(R.S.C., C. 162, S. 39).

In *The Queen* v. *Marsden* (1891), 2 Q.B. 149, a case was reserved for the opinion of the Court whether on an indictment for having carnal knowledge of a girl under thirteen years (under R.S.C., c. 162, s. 39—the age is ten years) it was necessary to prove emission. The Court (Lord Coleridge, C.J., Denman, Mathew, Cave, and Charles, JJ.) were unanimously of opinion that it was not.

APPOINTMENT OF PROXY—ATTESTATION BY PROXY HIMSELF, SUFFICIENCY OF.

In re Parrott (1891), 2 Q.B. 151, a question arose under the bankruptcy law, which, however, is of general interest, and deserves to be noticed here. A person

was appointed by the creditor of a bankrupt to act as his proxy at meetings of creditors; the proxy himself was the attesting witness to the execution of the appointment, and the question was whether this was sufficient under the Bankruptcy Rules, which require the appointment to be attested by a witness. Cave and Charles, JJ., held it was not, and that the proxy himself could not be a witness to the instrument of proxy. Though the case itself relates simply to a proxy in bankruptcy, yet in principle it applies to all other instruments required to be executed in the presence of a witness, except wills, as to which there is express statutory provision, when they are executed in the presence of a witness who is also named as a beneficiary therein.

LIBEL—PRIVILEGED COMMUNICATION—RAILWAY COMPANY—PUBLICATION TO COMPANY'S SERVANTS OF OFFENCES COMMITTED BY OTHER SERVANTS.

In *Hunt* v. *Great Northern Railway Co.* (1891), 2 Q.B. 189, the plaintiff had been a servant of the defendant company, and had been dismissed from their employ for an alleged gross neglect of duty. The company published his name in a printed monthly circular, addressed to their servants, stating in it that he had been dismissed and the ground of his dismissal. The plaintiff claimed that this was a libel; but the Court of Appeal (Lord Esher, M.R., Fry, and Lopes, L.JJ.) upheld the ruling of Stephen, J., that it was a privileged communication.

PRACTICE—COSTS—TRIAL WITH JURY—DISCRETION OF JUDGE—PLACE OF TRIAL—RULE 976—(ONT. RULE 1170).

Roberts v. *Jones—Willey* v. *Great Northern Railway* (1891), 2 Q.B. 194, is a double-barrelled case. In the first, the plaintiff, who lived in Cheshire, sued the defendant, who lived in Flintshire, for £640. The plaintiff not naming any place of trial, the action was tried before a jury in London, and the plaintiff recovered a verdict for £200. On the application of the defendant under Rule 976 (Ont. Rule 1170), it was ordered by Hawkins, J., that the plaintiff should be allowed, as against defendant, one-third of his costs, to be taxed as if the trial had been at Chester; and that the defendant should be allowed, as against the plaintiff, two-thirds of his costs, to be taxed treating the trial as being at London. In the second case, the plaintiff, who carried on business in Yorkshire, brought an action against the defendant company for injuries sustained in a collision, claiming £262 for injuries and £6388 for loss of trade. The plaintiff named Middlesex as the place of trial. The defendant made an unsuccessful attempt to change the venue to Leeds. The plaintiff recovered a verdict for £800. On the application of the defendant under the above Rule, it was also ordered by Hawkins, J., that the plaintiff should have his costs, so far as the action related to personal injuries, to be taxed as if the trial had been at Leeds; and that the defendants should have, as against the plaintiff, all their costs, so far as related to the claim for loss of trade, to be taxed treating the trial as taking place in Middlesex, and also the difference in the expenses of the defendants' medical witnesses arising from the action being tried in Middlesex instead of at Leeds. The case may be usefully referred to for what is said on the subject of what constitutes "good cause" for depriving a successful party of costs.

SIGNATURE OF SOLICITOR—SUBSCRIPTION BY CLERK FOR SOLICITOR.

In *France* v. *Dutton* (1891), 2 Q.B. 208, an attempt was made to extend the principle of *Reg.* v. *Cowper*, 24 Q.B.D. 60, 533 (see *ante* vol. 26, p. 295), in which it was held that a lithographed signature of a solicitor was an insufficient signature to particulars of a plaint in the County Court in order to entitle the solicitor to the costs of entering the plaint. In the present case, by County Court rules, certain sums may be allowed to a solicitor for preparing particulars of claim and copies thereof, "provided that such particulars and copies are signed by the solicitor." The particulars in question were signed by the solicitor's clerk, who had the management of the matter, and it was held the signature was sufficient. The distinction between the two cases is somewhat fine; in the case of a lithographed signature, it is usually printed before the document is filled up, and may not be a signature to a completed document. It is possible, however, that after the document is completed the clerk may affix the master's signature by a stamp, and we presume that would be within the present case just as much as if he had written the name.

PRACTICE—PRODUCTION OF DOCUMENTS—DOCUMENTS BELONGING TO SOLICITOR—PRIVILEGED COMMUNICATIONS.

In *O'Shea* v. *Wood* (1891), P. 286, an appeal was brought from the decision of Jeune, J. (1891), P. 237 (*ante* p. 300). The Court of Appeal (Lindley, Bowen, and Kay, L.JJ.) while agreeing with Jeune, J., that the documents belonging to the solicitor could not be ordered to be produced by the plaintiff, yet decided that an affidavit did not sufficiently protect the documents from production by merely stating them "to be privileged, as communications between the deponent and her solicitor," but that it is necessary to show that such letters are professional communications of a confidential character.

ADMINISTRATION—JOINT GRANT TO WIDOW AND TWO ELDER SONS—CONSENT OF MINOR.

In the goods of Dickinson (1891), P. 292, a joint grant of administration was made to a widow and her two eldest sons, all parties interested consenting, including a younger son, a minor, who was in his twenty-first year.

In the goods of Mann (1891), P. 293, a deceased person left a will limited to her property abroad, which was proved by the executors in the foreign court; but she died intestate as to her property in England. Under these circumstances, a grant of administration was made of the property in England to the sole next of kin.

WILL—CHARITABLE GIFT—LAPSE AFTER DEATH OF TESTATOR—CYPRÉS.

In re Slevin, Slevin v. *Hepburn* (1891), 2 Ch. 236, the Court of Appeal (Lindley, Bowen, and Kay, L.JJ.) overruled the decision of Stirling, J., noted *ante* p. 204, and held that the gift to the charity having failed by reason of the institution coming to an end after the death of the testator, the legacy did not fall into the residue, but went to the Crown for analogous charitable purposes.

PARTNERSHIP—PARTNER ENGAGING IN ANOTHER BUSINESS—USE OF NAME OF FIRM—PROFITS MADE BY PARTNER IN ANOTHER BUSINESS—INFORMATION GAINED AS PARTNER.

In *Aas* v. *Benham* (1891), 2 Ch. 244, the plaintiffs were members of the firm of H. Clarkson & Co., which carried on the business of shipbrokers, and of which firm the defendant was also a partner. The defendant, availing himself of the information he had acquired as such partner, had assisted in the formation of a joint stock company for building ships, and occasionally used the name and office paper of the firm in his correspondence on that subject. He received remuneration for his services in the formation of the company, and was made a director of the company at a salary. He also threatened to engage in the separate business of a shipowner under the style of "H. Clarkson & Co., Shipowning." The plaintiffs claimed to restrain him from using the name of the firm in a separate business, and also an account of his profits and salary in connection with the new company, and Kekewich, J., granted them this relief; but on appeal, Lindley, Bowen, and Kay, L.JJ., held that although the defendant was properly restrained from using the name of the firm in any separate business, yet that he was not accountable for profits and salary, because the business of the new company was beyond the scope of, and did not compete with the partnership business, and they held that the defendant's use of the firm name and paper in promoting the shipbuilding company was not sufficient to show that, as between the plaintiffs and defendant, shipbuilding was within the scope of the partnership business.

POWER TO EXECUTORS, EXERCISE OF—EXECUTOR RENOUNCING.

In *Crawford* v. *Forshaw* (1891), 2 Ch. 261, the decision of Kekewich, J., 43 Ch.D. 643 (noted *ante* vol. xxvi., p. 320), was reversed by the Court of Appeal (Lindley, Bowen, and Kay, L.JJ.). The question at issue, it may be remembered, was whether an executor who had renounced was nevertheless entitled to exercise a power of appointment given by the testator to "my executors herein named." Kekewich, J., held that the renouncing executor was entitled to join in exercising the power; but the Court of Appeal decided that the power was given to the executors in the character of executors, and that the two who had proved could exercise it alone.

LIBEL—INJUNCTION—JURISDICTION—DISCRETION—JUD. ACT, 1873, S. 25, S-S. 8—(R.S.O., C. 44, S. 58, S-S. 8).

Bonnard v. *Perryman* (1891), 2 Ch. 269, was an application for an interlocutory injunction to restrain the publication of a libel affecting the plaintiffs' trade and imputing to them dishonest and fraudulent conduct. The defendant filed an affidavit swearing that he would be able at the trial to justify the statements in the alleged libel. North, J., granted the injunction, but the majority of the Court of Appeal (Lord Coleridge, C.J., Lord Esher, M.R., Lindley, Bowen, and Lopes, L.JJ.) decided that although the Court had jurisdiction to grant an interlocutory injunction to restrain the publication of a libel, yet that it only ought to do so in the clearest cases, where any jury would say that the matter com-

plained of was libellous, and where if they did not so find the Court would set aside their verdict as unreasonable. In the present case the majority of the Court was not satisfied that the defendant at the trial would not be able to justify the publication complained of, and therefore were of opinion that the injunction should not have been granted. Kay, L.J., however, dissented, on the ground that he thought the defendant's affidavit defective in not showing the grounds for his belief in the facts deposed to, and that the balance of convenience was in favor of granting the injunction. It may be useful to note how this power to grant injunctions to restrain libels was acquired by the Court. By the C.L.P. Act, 1854 (see R.S.O., c. 52, s. 30), power was given to the former Common Law Courts to grant injunctions before or after judgment in any action for breach of contract or tort to restrain the defendant from the repetition of any breach of contract, or wrongful act complained of, and by the transfer of the jurisdiction of the Common Law Courts to the High Court (see Jud. Act, s. 20) this peculiar jurisdiction is now vested in the latter Court.

Notes on Exchanges and Legal Scrap Book.

THE *American Law Register*, the oldest law newspaper in the United States, has ceased to exist. It had for many years a high reputation and large circulation.

BILLS AND NOTES.—The New York Court of Appeal has decided (*Albany Law Journal*, July 18th) that a promissory note, payable a certain number of days after the death of the maker, is valid.

BENEFIT SOCIETIES.—The *Central Law Journal* of July 17th has an exhaustive article on the forfeiture of membership in benefit societies for non-payment of contributions and dues. It is too long for insertion, but should be noted for future use.

CERTIFIED CHECKS—LIABILITY OF DRAWER.—In *Metropolitan National Bank* v. *Jones*, 27 N. E.Rep. 533, the Supreme Court of Illinois holds that where the payee of a bank check has it certified by the bank, he thereby releases the drawer from liability thereon.

"SUN-STROKE is a disease, and does not come within the terms of a policy of insurance against bodily injuries sustained through external, violent, and accidental means, but expressly excepting 'any disease or bodily infirmity.'" *Dozier* v. *Fidelity and Casualty Co.* S.C., 46 Fed. Rep. 446.

A LADY BARRISTER.—Mlle. Bilcesco, the Roumanian lady barrister who lately took the degree of Doctor of Law at Paris, with a view to opening a profession to women in her own country, has just been admitted to practice in Bucharest. It was a stiff fight, but she succeeded in getting her special Bill passed by the Chambers, and September will see Portia a realized fact.—*Irish Law Times.*

VOID PROMISE TO PAY TENANT'S RENT.—An oral promise by a third person to pay the accruing rent to a landlord, in consideration of which the landlord forbears to evict tenant, and permits him to continue on the premises to the end of his term, without, however, releasing him from liability for the rent, is not the creation of a new and independent debt of the promisor, but is a mere promise to pay the debt of another, and is void under the Statute of Frauds.—*Riegelman* v. *Focht, Sup. Court of Pennsylvania.*

THE *Banking Law Journal* of July 15th has an article on the duties and liabilities of a bank director. We in Ontario have had that subject thrust upon us lately in an unpleasant and unsavory manner. As to directors doing much to prevent rascality by cashiers, the task is almost hopeless. The Government, which compels a double liability as against shareholders, should provide some effective system of audit by experts of high standing, and directors should be sure of the honesty of their president and cashier, and not let shady characters keep accounts at their bank, and not undertake duties which they know nothing about.

VICIOUS ANIMALS.—In an action against the owner of a dog admitted to be ferocious, and kept chained in an alley which, though private, was easily accessible, the plaintiff, a policeman, entered in pursuit of a suspicious character, and, without noticing the dog, was bitten and seriously injured. *Held*, that the defendant was negligent in keeping such a dog in such a manner, and was liable for the damages sustained. "The gravamen of the action is the keeping of the animal with knowledge of its propensities."—*Melsheimer* v. *Sullivan* (*27 Pacific Reporter* 17).

PERJURY BY LITIGANTS.—In dealing with an appeal from Chambers on Wednesday, Mr. Justice Williams stated that the result of his experience at the bar and upon the bench was that English witnesses who are not parties to the proceedings usually speak the truth, but that the litigants themselves do not, but generally swear to whatever they think will suit their case. He added that, in his opinion, the best remedy for this growing practice on the part of suitors was the infliction of very severe punishment whenever perjury was detected.—*Law Journal.*

MASTERS OF LAW.—The University Law School has determined on a new departure—a course of law for graduates. Any Bachelor of Law or member of

the Bar may enter for one to four afternoon hours each week. When he shall have completed four subjects, he will become a Master of Laws. The new professors, Abbott, who is Dean of the Faculty, and Tiedeman, who fills the chair of real property, are among the most widely-known American law writers. The courses for the current year include historical jurisprudence, advanced constitutional law, municipal corporations, the police power, the trial of causes, and the principles and methods of legal reasoning.—*New York Times.*

SILENCE NO ADMISSION.—The *London Daily News*, in commenting on the breach of promise case, *Wiedman* v. *Walpole*, says:—"The principle laid down by Baron Pollock would, if it had not been unanimously and decisively repudiated by the Master of the Rolls and the Lords Justices, have done immense mischief and produced a general feeling of social insecurity. According to Baron Pollock, neglect to answer a letter implies an admission that its contents are true. It would be intolerable if such were the case, and it is difficult to understand how any judge in his senses could have so ruled. Happily the Court of Appeal has pronounced an emphatic opinion the other way, and has decided that Mr. Walpole's silence was in law—we may add, in common sense—no corroboration of his alleged promise to marry the plaintiff."

REASONABLE TIME—BILL OF LADING.—The recent dock strike has given rise to yet another legal decision. We allude to the case of *Hick* v. *Rodocanachi & Sons*, recently decided by the Court of Appeal. The plaintiff, a shipowner, claimed damages from the bill of lading holders for the detention of his ship, caused by the inability of the defendants to take delivery of the cargo in consequence of the strike. The bill of lading contained no express limit of time within which the cargo was to be unloaded, and hence it was admittedly the duty of the consignees to take delivery in a reasonable time. The question for decision, therefore, was, what is reasonable time? In other words, is it to be estimated by the circumstances which ordinarily exist at the port; or is it to be estimated by the actual circumstances which exist at the time of the performance of the duty? The Court of Appeal have decided in favor of the latter view; and having found that the defendants did all they could under the circumstances which happened, they have given judgment in their favor. This seems in consonance with good sense and mercantile convenience. The very fact of a party contracting to do something not in a fixed time, but in a reasonable time, would seem to be based upon the idea that in the event of unforeseen circumstances, over which he had no control, temporarily preventing him from performing his part of the contract, he should not be liable for the delay. To adopt the other meaning would seem to amount to holding that in many instances "reasonable time" is "unreasonable time." The decisions on the point are difficult to reconcile, and the present decision was much needed.—*London Law Times.*

PRINCIPAL AND AGENT.—The United States Supreme Court has given a decision in the case of *Schutz* v. *Jordan* which may be of interest in these days of competition and business push. The head-note is thus given in the *New York Law Journal:*

If a would-be seller of merchandise conspire with an agent having general authority to purchase goods, but under special restrictions as to purchasing from such seller, of which the seller is aware, and, in pursuance of said conspiracy, goods are purchased in defiance of the restrictions, in the name of the principals, without their knowledge, and placed among the regular stock in said agent's department, no cause of action exists against the principals on contract for goods sold and delivered, whatever liability may attach for money had and received on account of the proceeds of such of said goods as are actually sold.

In an action for goods sold and delivered under such alleged circumstances, the burden of proof is on plaintiffs throughout to establish a valid contract of sale and delivery of goods thereunder. It rests upon plaintiffs to prove affirmatively that the agent had no authority to make the particular purchases declared upon. Mere proof of the receipt of the goods at the principal's place of business will not make out a *prima facie* case compelling them to establish the fraudulent character of the agent's dealings as an affirmative defence.

If it be proved that a letter, properly directed, was duly mailed, ordinarily the presumption is that it was received in the course of mail by the person to whom it was addressed. Yet, where a custom was shown on the part of principals to have their mail matter sorted and delivered to heads of departments, under which rule letters alleged to have been sent to the principals and which would have charged them with notice would have been handed to the conspiring agent aforesaid: *Held*, that such presumption did not exist; the presumption being only that it was received by the agent.

GRAND JURIES.—"A Magistrate" writes to the *Times* as follows: A learned recorder, Q.C., in charging the grand jury of a county town (there were no prisoners for trial!), made the following remarks: "He thought it possible that one of these days it might be considered that the attendance of a grand jury at quarter sessions was unnecessary, and there was a sufficient protection that persons would not be improperly put upon their trial, as the cases were heard in the first instance by the magistrates." How devoutly it is to be wished that this blessed day may come soon, and that the common sense of this recorder may prevail! In former days, when the squire heard the case of the poacher upon his own preserves, and committed him, with no other assistance than his own legal lore, the institution of a grand jury was indeed a safeguard; but in these enlightened times of magistrates' clerks and well-regulated petty sessions it is nothing less than absurd, as regards quarter sessions at least, that the deliberate opinions of justices advised by a lawyer should be submitted *quasi* for approval and should be liable to be overruled by less cultured minds. It is very doubtful, too, even as regards assizes, if the institution of a grand jury can be of any real

utility, except to share with a judge the responsibility of saying that such and such a prisoner shall not be put upon his trial in a particular class of case of an unmentionable character for want of evidence. But the judge in such cases is surely able to bring about the same result by a timely hint to counsel. Is there, however, any such further necessity, or even propriety, in the institution of a grand jury that it is worth while to continue the trouble and expense and loss of time involved? This is no age for pedantic and cumbersome methods of obtaining justice. No one travels nowadays by a stage-coach, except as a curiosity. The blast of the trumpet down St. James's Street is interesting, no doubt; but for the dozen persons sitting upon the coach there are a dozen thousand travelling on the railway. The relationship of a grand jury to a modern court of justice is somewhat in the same ratio. Magistrates and commercial men, who are bound to attend there, know that they are doing no good whatever, except, perhaps, to swell the triumph of a judicial car on a Roman holiday. Pedantry will not fail, I am aware, to dish up some sort of argument for the continual usefulness of a grand jury; but common sense says loudly, "No!" even though judges here and there may join in the chorus of admiration for this old-fashioned palladium of the liberty of the subject, which represents now only the waste of time, the waste of labor, and the waste of money.—*Law Journal.*

"PETIT MAL."—One of the most frequent pleas urged in favor of prisoners being tried for murder or manslaughter is that of insanity. The varieties of insanity are numerous, and one was disclosed at the assizes lately which, perhaps, has not been much noticed outside medical circles—that is, the complaint of *petit mal.* This, it appears, is really a short attack of epileptic insanity, and a person might have only one or two attacks in his lifetime, and no traces of this might be left on his system; further, a person might be having his dinner and suffer under such an attack without being aware of it. As to the effect of this complaint of *petit mal* as regards criminal actions, a man might in a moment of seizure do anything without knowing what he was doing, and it was quite possible for him to seize another person by the throat and cut it without being aware of what he was doing. It was impossible in one medical examination to say whether a man suffered from *petit mal.* These views were expressed during the trial of a man for the murder of his sweetheart. The counsel for the defence further referred to the malady. The medical evidence with regard to *petit mal* was that a man could attack those who were nearest to him, those he loved best—in fact, that the attack might be made under any kind of excitement—and the person committing it might know nothing of what he had done. He put it to them that the prisoner suffered from this complaint, and that being so, what greater excitement could be given to a young man than a refusal on the part of her he loved? In fact, in his letter to his father and mother, he said: "I should not have been where I now am if it had not been for my nasty temper," and, further, when the girl said, "Save me," he answered, "I will save you. Keep still where your are while I fetch help." The explanation of the reason

why he told a lie as to an assault on them was also reasonable. He wrote: "I knew if I told the truth they would not let me look at her, and I wanted to see her face again." All this was fully indicative of the condition of mind similiar to that under which a patient would be who suffered from *petit mal*. One of the medical men had said that if this disease showed itself it would most likely become apparent when the patient reached the age of puberty, and that was exactly the time at which the hereditary taint of insanity showed itself in the prisoner. The learned judge, in his summing up, pointed out that a certain care was needed not to weaken the criminal law by acquitting persons of criminal acts merely because they were of weak mind. If that were done half the criminal population in the country would be committing crime with a probability of going unpunished. It was not sufficient to prove a man to be of weak mind. Of course, with regard to a man like the prisoner, in whom there was no doubt of the hereditary taint, the consideration of the Crown, if necessary, would be properly exercised. The usual death sentence was passed. This case is one which those who are interested in medical jurisprudence might well make a note of.—*Law Journal.*

SOLICITOR'S LIEN.—Two points of great importance to the profession were decided by the Court of Appeal in *In re Taylor, Stileman & Underwood*, 60 L.J. Rep. Chanc. 525—the first as to the extent of a solicitor's retaining lien; the second as to its discharge by reason of the solicitor taking a security for his costs. In respect of the first point the solicitors set up their lien not only for their actual costs, charges, and expenses, but also for payments made on behalf of the client, such as the taxing-officer would take into account under the common order for taxation, but which he would have no power to moderate. The Court held that the lien could not be sustained for these advances, and laid down as a fair working test of what can and what cannot be brought under the lien that the lien extends to all items properly included in the bill of costs, charges, and expenses which the taxing-master has a right to consider, and, if necessary, moderate, but not to advances, which do not come within that category. The only authority cited in argument on this point appears to have been *In re Galland*, 55 Law J. Rep. Chanc. 478; L.R. 31 Chanc. Div. 296, which decided that a solicitor has no retaining lien for costs which he recovers by statute and not by contract between himself and his client. The case proceeded on the basis that the retaining lien arises out of contract. A similar view was taken in *In re Sharpe*, 1 Dowl. 432, where a solicitor was held to have no lien on deeds for expenses incurred by him in consequence of applications made to him by various claimants for the deeds. These authorities, however, have little direct bearing on the question before the Court in *In re Taylor*, where there was no dispute as to the existence of the contractual relation. More to the purpose is the passage from Sir Thomas Plumer's judgment in *Woorall* v. *Johnson*, 2 J. & W. 214, 218, quoted by Lord Justice Kay to the effect that a solicitor's lien "does not extend to general debts, but only to what is due to him in the character of attorney." Other cases bearing on the subject are *Irving* v. *Viana*, 2 Y. & J. 70, and *Christian*

v. *Field*, 2 Har. 177, 183, which show that a second solicitor in an action who pays off the first on succeeding to his place has no particular lien for the amount so paid. On the other hand, it was held in *Lambert* v. *Buckmaster*, 2 B. & C. 616, that the general lien will cover the solicitor's costs of an action brought by him against the client to recover his bill of costs in respect of which the lien is claimed. This decision was approved in the House of Lords in *Gray* v. *Graham*, 1 Pat. Scotch App. 615, 618. Lastly, in *In re Hill*, L.R. 33 Chanc. Div. 216, the particular lien on a fund was held to extend to the costs incurred by the solicitor in proving his retainer (which was disputed by the client), even though incurred after the date of the order directing taxation. So far as we are aware, these decisions represent the reported cases on the subject, and appear to be all of them consistent with the decision of the Court of Appeal in *In re Taylor*.

The other point before the Court arose in this way. The solicitors, while still acting for the client, took from her and her husband a joint and several promissory note for payment of the amount of their bill on demand with interest at the rate of 5 per cent., and this the Court held to amount to a discharge of the lien. Inasmuch as the security was plainly inconsistent with the lien—since a bill of costs for non-contentious business will only carry £4 per cent. interest, and that only for one month after delivery of the bill—the case was indistinguishable from *Roberts* v. *Jefferys*, 8 Law J. Rep. (o.s.) Chanc. 137, which the Court of Appeal approved and followed; but at the same time the Court went a good deal further, and laid down that where a solicitor takes a security for his costs from a client, for whom he is still acting, the *prima facie* inference, in default of evidence to the contrary, is that he has waived his lien. This proposition we believe to have been laid down for the first time in these broad terms, though it was discussed and considered an open question in *Brownlow* v. *Keating*, 2 Ir. Eq. (1840) 243. The following passage from Lord Justice Kay's judgment will show the reason and the limit of the rule: "We are dealing here," he says, "with a case between a solicitor and his own client. A solicitor has a duty to perform towards his client, to represent to his client all the facts of the case in a clear and intelligible manner, and to inform him of his rights and liabilities; and where you find a solicitor dealing with his client, and taking from him such a security as was given in this case, not expressly reserving his right of lien, I quite concur in thinking that this is a case in which the inference ought to be against the continuance of the lien."—*Law Journal.*

SECOND CONVICTION WHILE UNDER SENTENCE.—In *People* v. *Flynn*, Supreme Court of Utah, July 1, 1891, 26 Pac. Rep. 1114, it was held that where a convict escapes from the penitentiary and commits a grand larceny he may be convicted and sentenced therefor before he has served out his first sentence. The court said: "It was early held in England that persons convicted of felony, and thereby attainted, might plead the same in bar to a subsequent prosecution for any other felony, whether committed before or after the first conviction, for the reason that by his first attaint his possessions were forfeited, his blood corrupted, and he became dead in law; therefore any further conviction or

attaint would be fruitless. 4 Bl. Com. 336; 2 Hale P. C. 250; 1 Chit. Crim. Law, 464. This same doctrine was carried out in the case of *Crenshaw* v. *State*, 1 Mart. & Y. 122, wherein it is held that a conviction, judgment and execution upon one indictment for a felony not capital is a bar to all other indictments for felonies not capital committed previous to such conviction. This doctrine, however, has seldom been followed in the United States, and the above case, though not expressly overruled, seems to be the only adjudication in this country recognizing this doctrine. Bishop, in his Criminal Law, volume 1, section 898, says: 'It was a doctrine of the English law, at the time when this country was settled, that as a general rule, to which there were few exceptions, a person attainted for one felony could not be prosecuted criminally for another. But this doctrine, though recognized in one or two American cases, is not usually followed in this country. In England it was long ago abolished by an Act of Parliament.' In *Hawkins* v. *State*, 1 Port. (Ala.) 475, the court holds that neither a conviction nor pardon for any particular offence can, in that State, operate as a bar or discharge of any other distinct offence; and it is now generally conceded throughout the United States that the doctrine that a conviction for another distinct felony, committed either before or after the first conviction, or while the criminal is serving out his sentence thereon, does not prevail in this country, and is as repugnant to the established principle of modern criminal law as it is unsupported by reason. *Rex* v. *Vandercomb*, 1 Lead. Crim. Cas. 528; Archb. Crim. Pr. (Pom. Notes) 350; *State* v. *Commissioners*, 2 Murph. 371; *State* v. *McCarty*, 1 Bay, 334; 1 Bish. Crim. Law, ss. 731-884, 898, 953. Again, referring to Bishop's Criminal Law, the writer lays down the rule to be that 'when a prisoner, under an unexpired sentence of imprisonment, is convicted of a second offence, or when there are two or more convictions on which sentence remains to be pronounced, the judgment may direct that each succeeding period of imprisonment shall commence on the termination of the period next preceding.' 1 Bish. Crim. Law, ss. 731, 884. In the case of *People* v. *Majors*, 65 Cal. 138, it is held that a person may be tried and convicted for the crime of murder, notwithstanding he is at the time of the trial and sentence serving out a previous sentence of life imprisonment for another murder, committed at the same time, and imposed by another court. So in the case of *People* v. *Hong Ah Duck*, 61 Cal. 387, it was held that on a trial for murder it was competent for the prosecution to show that at the time of the homicide the defendant was a convict in the penitentiary, serving out a life sentence, and that the homicide was committed while so imprisoned, the object being to give the jury to understand that if they found the defendant guilty of murder in the first degree, with a recommendation to imprisonment for life, and by said verdict fixed the imprisonment for life, the punishment would be no more than the defendant was then undergoing under a former conviction, and that such a verdict would be no punishment whatever unless the jury made it punishable with death. In this Territory there is no statute exempting a convict from punishment for an offence committed by him while serving out his term of imprisonment. Our general penal laws include all persons within their scope. The criminal is protected by the law, and is made amenable to it, while in prison,

for any term of imprisonment. The statute of limitations requires prosecution for all felonies, other than for murder, to be commenced within four years after the commission of the offence, and, if not so commenced, the prosecution is barred. It is true, an indictment may be found before the expiration of the statutory limit, and the prisoner may be arrested and tried thereon after the expiration of his term of imprisonment; but it is not difficult to discover that this practice, if inaugurated, would not only greatly delay the execution of public justice, but in many instances would prevent a speedy trial that is guaranteed to all accused persons. It would impair the necessary discipline required in public prisons, and in a measure become a shield and protection to the criminals therein confined."—*Albany Law Journal.*

Proceedings of Law Societies.

LAW SOCIETY OF UPPER CANADA.

HILARY TERM, 1891.

The following is a *résumé* of the proceedings of Convocation during the above Term:—

The following gentlemen were called to the Bar, viz.:

February 2nd.—William John Hatton, Robert Ernest Gemmell, Walter Thompson Evans, Marshall Orla Johnston, Norman Blain Gash, Charles James Notter, Dighton Winans Baxter, William Loughton Morton, John Agnew, Edwin George Patrick Pickup, Roderick Balmacara Matheson, Henry Albert Simpson, Dudley Holmes, George Wellington Greene, William John Kidd, William Carnew, Henry Lumley Drayton, Frederick William Hill, James Fraser Macdonald, Stewart Charles Macdonald.

February 3rd.—Charles Currie Gregory (special case).

The following gentlemen were granted Certificates of Fitness as Solicitors, viz.:

February 2nd.—A. F. Wilson, W. T. Evans, E. G. P. Pickup, S. C. Macdonald, W. York, W. L. B. Lister, J. F. Carmichael, A. C. Sutton.

February 3rd.—C. J. Notter, J. J. O'Meara, H. White, R. E. Gemmell, F. W. Hill.

February 7th.—W. L. E. Marsh, H. Macdonald, W. Carnew, R. B. Matheson, J. W. Evans, N. B. Gash.

February 13th.—J. Agnew, C. Elliott, W. S. McBrayne.

The following gentlemen passed the Second Intermediate Examination, viz.: W. B. Taylor, T. C. Cameron, R. S. Robertson, T. W. McGarry, J. E. Varley, W. L. Wickett, P. F. Carscallen, Jas. Kerr, W. J. Harvey, L. H. Lafferty, A. J. F. Sullivan, J. O. Dromgole, S. D. Schultz, J. E. Bird, and A. C. M. B. Jones.

The following gentlemen passed the First Intermediate Examination, viz.: C. S. Dunbar, A. S. Dickson, H. D. Petrie, J. S. McKay, W. L. Phelps, H. P. Innes, and D. B. Mulligan.

Monday, February 2nd.

Convocation met.

Present—The Treasurer and Messrs. Irving and Moss, and in addition, from 11 a.m. to adjournment, Messrs. Beaty, Ferguson, Foy, Mackelcan, Meredith, Murray, Purdom, and Robinson.

The minutes of last meeting were read and approved.

Convocation proceeded to the election of a Bencher in the place of the late Mr. J. H. Morris, Q.C.

Mr. C. H. Ritchie, Q.C., was elected.

Mr. Moss presented a Report from the Building Committee.

Ordered for immediate consideration.

Ordered, that the cut stone arch and surroundings reported by the architect as adding $1,000 to the cost be deducted, and that it be referred to the Building Committee to arrange as to the entrance, and to agree to the necessary modifications in the tenders, and to procure the contracts to be executed with the lowest tenderers.

Upon the Report of the Finance Committee, it was

Ordered, that Mr. Grasett, one of the assistants to the Secretary, be granted three months' leave of absence, owing to ill-health.

Ordered, that Mr. Martin be appointed to the Legal Education Committee, in place of the late Mr. Morris.

The Secretary laid on the table a list or register of members of the Bar entitled to vote at the election of Benchers.

Tuesday, February 3rd.

Convocation met.

Present—Before 11 a.m., the Treasurer, and Messrs. Bruce, Martin, Moss, Murray, Shepley; at and after 11 a.m., Messrs. Britton, Kerr, McMichael, and Robinson.

The minutes of last meeting were read and approved.

Ordered, that Messrs. J. E. Robertson and F. M. Morson be appointed scrutineers in connection with the election of Benchers.

Ordered, that Mr. Irving be appointed to act as and for the Treasurer in case of his absence in connection with the election of Benchers.

The petition of certain students as to the payment of fees was read and received.

Ordered, that it be referred to the Finance Committee to report a draft rule to meet the complaint.

Ordered, that Mr. Ritchie be appointed a member of the Committee on Law Reporting, in place of Mr. Martin, resigned.

Saturday, February 7th.

Convocation met.

Present—The Treasurer, and Messrs. Bell, Ferguson, Foy, Hoskin, Kingsmill, Mackelcan, Meredith, Moss, Murray, Osler, and Smith.

The minutes of last meeting were read and approved.

Mr. Murray moved for leave to introduce a rule with regard to the payment of students' fees.

The rule was read a first time.

Ordered for a second reading at next meeting.

Mr. Murray, from the Finance Committee, presented a Report as to the yearly expenditure of the Society and its balance sheet for the past year.

Ordered, that the balance sheet be distributed and the report considered at the next meeting.

Mr. Mackelcan gave notice of motion for next meeting:

That the diploma given to each barrister upon his call to the Bar should have indorsed upon it the form of the oath to be taken by him before entering upon the practice of his profession, or that the terms of the oath, as containing an epitome of his duties as a barrister, should be prominently brought to his notice upon his call to the Bar, and that it should also appear in the printed Rules of the Society.

Friday, February 13th.

Convocation met.

Present—The Treasurer and Messrs. Britton, Christie, Foy, Hoskin, Irving, Kerr, Kingsmill, Lash, Mackelcan, Martin, Meredith, Moss, Murray, Purdom, Ritchie, Robinson, and Shepley.

The minutes of last meeting were read and approved.

Mr. Moss presented the Report of the Legal Education Committee on the reference to them as to the Royal Military College, as follows:

1. Your Committee have had under consideration the following resolution of Convocation, viz.:—

"That it be referred to the Legal Education Committee to consider and report on the first day of next term whether any, and if so, on what terms, graduates of the Military College should be admitted and called on more favorable conditions than ordinary students and clerks."

2. The Committee recommend that provision be made (*a*) for the admission to the Society as students-at-law of cadets of the Royal Military College who have received diplomas of graduation upon production of such diplomas and compliance with the other rules and regulations of the Society with regard to admission as students; (*b*) for entitling such students to be called to to the Bar and admitted to practise as solicitors at the expiration of three years from their admission, they having first conformed to the other rules and regulations of the Society respecting call to the Bar and admission to practice.

(Signed) CHARLES MOSS,
Chairman.

February 12th, 1891.

The Report was ordered for immediate consideration and was adopted.

Mr. Meredith moved for leave to introduce a rule based on the Report.—*Carried.*

Ordered, that the rule be read a first time.

Ordered, that the rule be read a second time on the second day of next Term.

Mr. Britton gave notice of motion to amend the said rule by providing that the matriculation examination of the Royal Military College shall be accepted for entrance to the Law Society.

Mr. Moss presented the Report of the Legal Education Committee on the reference to them as to legislation on call to the Bar, as follows:

1. The Committee have had under consideration the resolution of Convocation by which it was referred to them to prepare and submit to the Attorney-General for consideration legislation

in the sense of authorizing Convocation to call to the Bar any solicitor in good standing who has been practising the profession for ten years prior to the first day of July, 1889.

2. The Committee beg to call the attention of Convocation to the rules now in existence with regard to the call of solicitors to the Bar in special cases, viz., Rules 206 to 210 inclusive.

3. The Committee are of opinion that in regard to solicitors of the class mentioned in the resolution an amendment to the rules so as to enable Convocation to call such solicitors upon their passing such examination as may be prescribed at the time of their application will meet the object of the resolution.

(Signed) CHARLES MOSS,
Chairman.

February 12th, 1891.

The Report was ordered for immediate consideration, and was adopted.

Ordered, that leave be granted to introduce a rule based on the Report.

Mr. Lash moved that Rule 209 be amended accordingly.

The rule was read a first time.

Mr. Lash moved that the rule be now read a second and third time.—*Carried unanimously.*

The rule was read a second and third time and passed.

Rule 209 as amended :

A barrister, as mentioned in sub-sections 2 and 3 of Rule 206, shall pass such examination as may be prescribed at the time of his application, *and a solicitor of the Supreme Court of Judicature for Ontario, in good standing, who has been practising his profession in this Province for ten years prior to the first day of July*, 1889, *shall pass such examination as may be prescribed at the time of his application.*

Mr. Ferguson presented the Report of the Committee on the Roll of Benchers as follows :

The Committee to whom the Roll of Benchers prepared by Mr. Read, Q.C., was referred for revision and for the consideration of the question of remuneration to be paid to Mr. Read, beg leave to report that they have not been able to complete their revision of the list, and ask leave to retain the consideration of that portion of the reference till next term.

And as to the remuneration to be paid to Mr. Read for his services, they report that, in the opinion of the Committee, the value of the same to the Society is of about the sum of one hundred dollars, and recommend that that sum be paid to Mr. Read.

(Signed) F. MACKELCAN,
J. K. KERR,
J. H. FERGUSON,
GEO. F. SHEPLEY.

The Report was ordered for immediate consideration, adopted, and ordered accordingly.

The letter of Miss M. Wynn, resigning her situation as telegraph and telephone operator, was read.

Ordered, that her resignation, to take effect on 1st March, 1891, be accepted, and that her sister, Miss G. Wynn, be appointed operator on the same terms and conditions as Miss M. Wynn.

Ordered, that Mr. H. R. Hardy be paid $100 in full compensation for his loss on the Law List of last year and $150 for the Law List for this year, and that it be referred to the Reporting Committee to report next term as to proper arrangements for future years, and to make any necessary arrangements for this year, in case Mr. Hardy declines the remuneration directed by this resolution.

The Report of the Finance Committee and the Balance Sheet ordered to be taken into consideration this day were taken up.

The Report was adopted.

Ordered, that the Finance Committee do prepare and add to the Balance Sheet, for distribution, a detailed memorandum showing the abnormal expenditure for the year in addition to the permanent expenditure.

The rule as to the fees of students was read a second and third time and passed as follows:

RULE.—In all cases where students in the Law School are entitled to present themselves for their final examinations for call to the Bar or admission as solicitors before the expiration of three or five years, as the case may be, from the time of their admission into the Society, they may present themselves for such examinations upon paying the sum of $10 for each examination; and, having passed such examinations, they may thereafter on the expiration of such three or five years, as the case may be, be called to the Bar and enrolled as solicitors upon paying the sums of $90 and $50 respectively on or before the third Saturday preceding the terms in which they are so entitled to be so called or enrolled; and that in case of the failure of any student, the sums paid on the examinations be forfeited, and the application of this rule shall terminate as to such student.

Mr. Martin, pursuant to notice, moved for leave to introduce a rule limiting the annual grant to County Libraries on all accounts to $700.

Ordered, that the rule be read a first time.

Ordered, that the rule be read a second time on the second day of next Term.

Ordered, that the matter of the proposed rule be referred to the County Libraries Aid Committee to enquire into the same and to report their views thereon on the first day of next Term.

Ordered, that Mr. Berthon be commissioned to make copies of the portraits of Chief Justice Elmsley and Chief Justice Powell, now shown to Convocation, at the price of $150 each.

Ordered, that leave be granted to introduce a rule providing for sending out the voting papers for the election of Benchers.

The rule was read a first, second, and third time unanimously, and is in the words following:

RULE.—The form of voting paper for election of Benchers required by sec. 10 of chap. 145 of R.S.O., 1887, shall be sent by the Secretary by mail to each member of the Bar entitled to receive such voting paper between the first and tenth days of March preceding the day of election.

Convocation adjourned.

J. K. KERR,
Chairman Committee on Journals.

DIARY FOR SEPTEMBER.

2. Wed.....De Beauharnois, Governor, 1726.
6. Sun.....*15th Sunday after Trinity.*
8. Tues.....General Sessions and County Court Sittings for Trial in York.
12. Sat.....Frontenac, Governor of Canada, 1692.
13. Sun.....*16th Sunday after Trinity.* Quebec taken, and death of Wolfe, 1759.
14. Mon.....Trinity term commences. Jacques Cartier arrived at Quebec, 1535.
15. Tues.....Ct. of Appeal sits. Civil Assizes at Hamilton.
17. Thur.....First Parliament of Upper Canada met at Niagara, 1792.
18. Fri.....Quebec surrendered to the British, 1759.
20. Sun.....*17th Sunday after Trinity.*
21. Mon.....St. Matthias.
23. Wed.....Courcelles, Governor of Canada, 1665.
24. Thur.....Guy Carleton, Lieut.-Gen. and Commander-in-Chief, 1766.
26. Sat.....Trinity Term ends. Relief of Lucknow, 1857.
27. Sun.....*18th Sunday after Trinity.*
28. Mon.....Criminal Assizes at Toronto. W. H. Blake, 1st Chan. U.C., 1849.
29. Tues.....St. Michael and All Angels.
30. Sun.....Sir Isaac Brock, Administrator, 1811.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

Div'l Court] [June 19.

MINGEAUD *v.* PACKER.

Insurance—Life—Benefit society—Change of direction as to payment—Trust—Revocation—R.S.O., c. 172—R.S.O., c. 136—51 Vict., c. 22.

A person, whose life was insured in a benefit society, incorporated under R.S.O., 1877, c. 167, as amended by 41 Vict., c. 8, s. 18 (R.S.O., 1887, c. 172), on the 28th January, 1888, his first wife being then dead, caused to be issued to him a certificate making the insurance money payable to his children. After this, he married again, and on the 1st June, 1889, at his request, a change was made, and a new certificate issued, making the money payable to his second wife. He died on the 19th Nov., 1889.

Held, reversing the judgment of STREET, J., that the effect of 51 Vict., c. 22, was to make the certificate of the 28th January, 1888, subject to the provisions of R.S.O., c. 136, and that the rules of the society, in so far as they were inconsistent with such provisions, were modified and controlled by them; and such certificate became a trust for the children, under s. 5 of R.S.O., c. 136, and ceased, so long as the objects of the trust remained, to be under the control of the deceased, except only in accordance with ss. 5 and 6, which did not authorize him to revoke the certificate and replace it by the subsequent one.

N. F. Paterson, Q.C., for the plaintiff.

C. J. Holman and *D. B. Simpson* for the defendants.

IN RE MCGUGAN *v.* MCGUGAN.

County Court—Equity jurisdiction—32 Vict., c. 6, s. 4—Judicature Act—Qui tam action by ratepayer of school section to recover moneys improperly paid out by trustees—"Personal actions," R.S.O., c. 47, s. 19—Power to transfer to High Court—R.S.O., c. 47, s. 38—Prohibition—Solicitor and client—Bill of costs—Public School Board—Ratepayer applying for taxation—R.S.O., c. 147, s. 42—Rule 1229—R.S.O., c. 225, s. 39—Duty of auditors of school section.

Since 32 Vict., c. 6, s. 4, the County Courts have had common law jurisdiction only; the Judicature Act did not alter the jurisdiction of those Courts, but only made applicable to matters cognizable by them the several rules of law thereby enacted and declared.

An action by a ratepayer of a school section, on behalf of himself and all other ratepayers, against the trustees of the section, seeking to compel the defendants to pay to the treasurer of the section such amount as might be disallowed upon taxation of a bill of costs paid by the trustees to a solicitor, is one of purely equitable jurisdiction, and is not cognizable by a County Court, even though the amount in question is not more than $200.

The term "personal actions" used in R.S.O., c. 47, s. 19, means common law actions.

If a County Court has no jurisdiction over the plaintiff's cause of action, the proceedings in respect thereof in that Court are all *coram non judice*, and the judge of that Court has no power over them; s. 38 of R.S.O., c. 47 applies only where the action in which the equitable question is raised is within the jurisdiction of the County Court.

Prohibition granted to restrain a county judge from transferring to the High Court an action brought in the County Court for an equitable cause of action.

A ratepayer of a school section is entitled under R.S.O., c. 147, s. 42, to a taxation of a bill of costs rendered by a solicitor to and paid by the school board of the section.

Re Barber, 14 M. & W. 720, distinguished.
Ex parte Bass, 17 L.J. Ch. 219; 2 Phil. 562.
Re Skinner, 13 P.R. 276, 447, followed.
Semble, even if s. 42 did not apply, a ratepayer would be entitled to a taxation under Rule 1229.

There is nothing in s. 39 of R.S.O., c. 225, providing that it shall be the duty of the auditors of every school section to examine into and decide upon the accuracy of the accounts of the section, and whether the trustees have duly accounted for and expended for school purposes the moneys received by them, to prevent an application by a ratepayer for taxation of such a bill.

J. A. Robinson for the plaintiff.
J. M. Glenn for the defendants.

MARSH *v.* WEBB.

Title to land—Adverse possession—32 Henry VIII., c. 9—Husband and wife—Estoppel—Subrogation.

In 1841 land was granted by King's College to G., who conveyed it in 1849 to a married woman, who, with her husband, was in possession at the time of the grant to G. The conveyance to the married woman was executed by her husband. The husband and wife lived together on the land till her death in 1864, and the husband till 1870. He died in January, 1889. In an action of ejectment, begun in October, 1889, by the heirs-at-law of the wife against persons claiming under the husband,

Held, reversing the judgment of ROSE, J., that the possession of the husband was not adverse at the time of the conveyance to G., and therefore that conveyance and the subsequent conveyance to the wife were operative, notwithstanding the statute 32 Henry VIII., c. 9, then in force.

Per ARMOUR, C.J., that the conveyance to the wife was made by the procurement of the husband, and he, having no other right or title to the land, was estopped from denying the validity of G.'s title.

Held, also, upon the evidence, that the plaintiffs were not estopped by the dealings of their ancestors with the land; and that the defendants were not entitled to be subrogated to the rights of a mortgagee in whose mortgage she had joined as a granting party.

J. R. Roaf for the plaintiffs.
F. L. Webb for the defendants.

STREET, J.] [August 14.

IN RE GARBUTT.

Extradition—Evidence—Alibi—Identity—Extradition judge—Junior judge of County Court—R.S.C., c. 142, s. 6, s-s. 2, directory—Forgery—Information—Variance from proof—Christian name of indorser—R.S.C., c. 174, ss. 57, 58, 70—Reading over foreign depositions to prisoner.

Where evidence is given by the prosecution before an extradition judge positively identifying the prisoner, the judge cannot receive evidence on behalf of the prisoner to show an alibi, for that would be in effect trying the guilt or innocence of the prisoner; if the evidence given by the prosecution is sufficient to justify the commital of the prisoner, he must be committed under s. 11 of the Extradition Act, R.S.C., c. 142.

Semble, that a prisoner is entitled to go into evidence to disprove his identity; but that means his identity with the person named in the warrant, not his identity with the person who actually committed the extradition crime.

The junior judge of a County Court is a judge of a County Court, and has the functions of an extradition judge.

Re Parker, 19 O.R. 612, followed.

R.S.C., c. 142, s. 6, s-s. 2, is directory only, and the neglect of a judge to forward to the Minister of Justice a report of the issue of a warrant, as required by the sub-section, is not a ground for the discharge of the prisoner.

The information upon which a warrant issued committing a person to await extradition for forgery stated the Christian name of the indorser of the forged instrument as Albert, whereas when the instrument was proved it appeared to be James.

Held, that the variance was immaterial under ss. 57 and 58 of R.S.C., c. 174, which are made applicable to extradition proceedings by s. 9 of R.S.C., c. 142.

It was objected by the prisoner that certain depositions taken abroad and put in by the prosecution were not read over to the prisoner, as required by s. 70 of R.S.C., c. 174.

Held, that the objection was not one which as a matter of law would entitle a prisoner to be discharged, and it should not be given effect to as a matter of discretion because it was entirely technical in its character.

W. G. Murdoch for the prisoner.
J. W. Curry for the prosecution.

STREET, J.] [August 20.

IN RE MCPHERSON *v.* MCPHEE.

Prohibition—Division Court—Judge reserving judgment without naming hour—R.S.O., c. 51, s. 144—Prejudice—Waiver.

The judge who tried a plaint in a Division Court reserved judgment and indorsed on the summons "judgment in a week." Upon the day indicated by the indorsement he gave judgment against the defendant; the judgment came to the knowledge of the defendant, who made an application within the proper time, upon the merits, for a new trial or to set aside the judgment, which application was refused.

Upon an application by the defendant for prohibition upon the ground that the judge did not fix any day or hour for giving judgment, as required by R.S.O., c. 51, s. 144,

Held, that there was no ground for a prohibition; for the defendant was not prejudiced by the omission, and the irregularity was waived by the application upon the merits without any reference to the objection.

In re Tipling v. *Cole*, *ante* 411; and *Re McGregor* v. *Norton*, 13 P.R. 223, distinguished.

Re Smart and O'Reilly, 7 P.R. 364, followed.

McCabe for the defendant.

Douglas Armour for the plaintiff.

Practice.

STREET, J.] [June 11.

UNGER *v.* BRENNAN.

Venue—Change of—Fair trial—Jury—Trial judge.

The plaintiff was a settler in the district of Muskoka, and the defendant a timber licensee. The question of fact between them was whether certain timber was the property of the plaintiff or of the defendant. The defendant applied to have venue changed from Muskoka, on the ground that the jury would be largely drawn from the settler class, and that he believed he would not have a fair trial.

Held, that this was not a ground for change of venue, and any possible injustice to the defendant would be prevented by the trial judge, who would have a discretion as to the mode of trial.

Marsh, Q.C., for the plaintiff.

Osler, Q.C., for the defendant.

STREET, J.] [July 20.

MASON *v.* VAN CAMP.

Particulars—Seduction.

Where the defendant in an action of seduction denies the seduction on oath, the plaintiff will be required to furnish particulars of the times and places at which it is charged that the alleged seduction took place.

Hollister v. *Annable*, 14 P.R. 11, approved.

Notwithstanding differences in the Rules, the principle upon which particulars are ordered is the same here as in England.

Shepley, Q.C., for the plaintiff.

D. Armour for the defendant.

MEREDITH, J.] [July 21.

MACKENZIE *v.* ROSS.

Judgment—Default of appearance—Money demand—Leave to proceed upon another claim.

Where the writ of summons was specially indorsed to recover a money demand, and was also endorsed with a claim to set aside a conveyance, the plaintiff was allowed, upon default of appearance, to sign judgment for the money demand, and to proceed in the ordinary way upon the other claim.

Huffman v. *Doner*, 12 P.R. 492; *Hay* v. *Johnston*, ib. 596, followed.

W. H. Blake for the plaintiff.

STREET, J.] [Aug. 8.

IN RE YOUNG.

Costs—R.S.O., c. 124, s. 6—Removal of assignee—County Court judge—Persona designata—Power to order costs—Rule 1170 (a).

Where a judge of a County Court, acting under R.S.O., c. 124, s. 6, orders the removal of an assignee, he exercises a statutory jurisdiction as *persona designata*, and has no power to order payment of costs.

The proceedings in such a case are not in any court; and Rule 1170 (*a*) does not apply to them.

Re Pacquette, 11 P.R. 463, followed.

History and construction of Rule 1170 (*a*).

Douglas Armour for the assignee.

A. W. Anglin for the creditors.

Flotsam and Jetsam.

A couple of lawyers engaged in a case were recently discussing the issue.

"At all events," said the younger and more enthusiastic, "we have justice on our side."

To which the older and warier replied, "Quite true; but what we want is the Chief-Justice on our side."—*Ex.*

HERE is an important head-note in a Scotch case: "The defender, seeing a cat running past in a public street, called to a dog beside him to 'seize it.' The dog accordingly gave chase to catch the cat, and in doing so knocked down and injured a child. *Held*, that the defender, in setting a dog to chase a cat through the street, acted negligently and without due care for passers-by, and was found liable in damages."—*Law Times.*

MR. JUSTICE PARK never lost an opportunity of pointing a "temperance" moral. On one occasion he had before him a witness named Elm, who confessed to being eighty-four years of age, and seemed wonderfully well-preserved. After his examination had been concluded, the judge looked over his spectacles at the patriarch and said, "Now, Mr. Elm, you're an old man. Perhaps you will favor me by telling me how you live? Do you ever indulge in strong drink?" "My Lord," replied the witness, solemnly, "I can assure your lordship that I ain't touched beer or sperrits this forty-three years." "There now, gentlemen of the jury," said the judge, triumphantly, "there's a lesson for you all!" The next witness was also called Elm, a brother of the preceding, who actually looked younger and more alert, though no less than five years older. To him Mr. Justice Park said, "Well, Mr. Elm, I suppose your habits are those of your brother. *You* never touch anything stronger than water." "Beg parding, my lord," replied the witness, scratching his head meditatively. "My wife, she *do* say that I ain't been to bed sober these fifty years!" Here a titter ran round the court, and the poor judge was just a little discomfited. However, he regained his composure, and with a twinkle in in his beaming eye said, "Well, all I can say is, gentlemen, that the Elm is a well-seasoned wood, wet or dry."

Law Society of Upper Canada.

THE LAW SCHOOL, 1891.

LEGAL EDUCATION COMMITTEE.

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F. MACKELCAN, Q.C. C. ROBINSON, Q.C.
J. V. TEETZEL, Q.C.

This notice is designed to afford necessary information to Students-at-Law and Articled Clerks, and those intending to become such, in regard to their course of study and examinations. They are, however, also recommended to read carefully in connection herewith the Rules of the Law Society, copies of which may be obtained from Principal of the Law School, Osgoode Hall, Toronto.

Those Students-at-Law and Articled Clerks, who, under the Rules, are required to attend the Law School during all the three terms of the School Course, will pass all their examinations in the School, and are governed by the School Curriculum only. Those who are entirely exempt from attendance in the School will pass all their examinations under the existing Curriculum of The Law Society Examinations as heretofore. Those who are required to attend the School during one term or two terms only will pass the School Examination for such term or terms, and their other Examination or Examinations at the usual Law Society Examinations under the existing Curriculum.

Provision will be made for Law Society Examinations under the existing Curriculum as formerly for those students and clerks who are wholly or partially exempt from attendance in the Law School.

Each Curriculum is therefore published herein accompanied by those directions which appear to be most necessary for the guidance of the student.

CURRICULUM OF THE LAW SCHOOL, OSGOODE HALL, TORONTO.

Principal, W. A. REEVE, M.A. Q.C.

Lecturers: E. D. ARMOUR, Q.C.
A. H. MARSH, B.A., LL.B., Q.C.
R. E. KINGSFORD, M.A., LL.B.
P. H. DRAYTON.

The School is established by the Law Society of Upper Canada, under the provisions of rules passed by the Society with the assent of the Visitors.

Its purpose is to promote legal education by affording instruction in law and legal subjects to all Students entering the Law Society.

The course in the School is a three years' course. The term commences on the fourth Monday in September and closes on the first Monday in May; with a vacation commencing on the Saturday before Christmas and ending on the Saturday after New Year's Day.

Students before entering the School must have been admitted upon the books of the Law Society as Students-at-Law or Articled Clerks. Admission is to be gained during Easter and Trinity terms only. The steps required to procure such admission are provided for by the rules of the Society, numbers 126 to 141 inclusive.

The School term, if duly attended by a Student-at-Law or Articled Clerk is allowed as part of the term of attendance in a Barrister's chambers or service under articles.

The Law School examinations at the close of the School term, which include the work of the first and second years of the School course respectively, constitute the First and Second Intermediate Examinations respectively, which by the rules of the Law Society, each student and articled clerk is required to pass during his course; and the School examination which includes the work of the third year of the School course, constitutes the examination for Call to the Bar, and admission as a Solicitor.

Honors, Scholarships, and Medals are awarded in connection with these examinations. Three Scholarships, one of $100, one of $60, and one of $40, are offered for competition in connection with each of the first and second year's examinations, and one gold medal, one silver medal, and one bronze medal in connection with the third year's examination, as provided by rules 196 to 205, both inclusive.

The following Students-at-Law and Articled Clerks are exempt from attendance at the School.

1. All Students-at-Law and Articled Clerks attending in a Barrister's chambers or serving under articles elsewhere than in Toronto, and who were admitted prior to Hilary Term, 1889.

2. All graduates who on the 25th day of June, 1889, had entered upon the *second* year of their course as Students-at-Law or Articled Clerks.

3. All non-graduates who at that date had entered upon the *fourth* year of their course as Students-at-Law or Articled Clerks.

In regard to all other Students-at-Law and Articled Clerks, attendance at the School for one or more terms is compulsory as provided by the Rules numbers 155 to 166 inclusive.

Any Student-at-Law or Articled Clerk may attend any term in the School upon payment of the prescribed fees.

Students and clerks who are exempt, either in whole or in part, from attendance at The Law School, may elect to attend the School, and to pass the School examinations, in lieu of those under the existing Law Society Curriculum. Such election shall be in writing, and, after making it, the Student or Clerk will be bound to attend the lectures, and pass the School examination as if originally required by the rules to do so.

A Student or Clerk who is required to attend the School during one term only, will attend during that term which ends in the last year of his period of attendance in a Barrister's Chambers or Service under Articles, and will be entitled to present himself for his final examination at the close of such term in May, although his period of attendance in Chambers or Service under Articles may not have expired. In like manner those who are required to attend during two terms, or three terms, will attend during those terms which end in the last two, or the last three years respectively of their period of attendance, or Service, as the case may be.

Every Student-at-Law and Articled Clerk before being allowed to attend the School, must present to the Principal a certificate of the Secretary of the Law Society shewing that he has been duly admitted upon the books of the Society, and that he has paid the prescribed fee for the term.

The Course during each term embraces lectures, recitations, discussions, and other oral

methods of instruction, and the holding of moot courts under the supervision of the Principal and Lecturers.

During his attendance in the School, the Student is recommended and encouraged to devote the time not occupied in attendance upon lectures, recitations, discussions or moot courts, in the reading and study of the books and subjects prescribed for or dealt with in the course upon which he is in attendance. As far as practicable, Students will be provided with room and the use of books for this purpose.

The subjects and text-books for lectures and examinations are those set forth in the following Curriculum:

FIRST YEAR.

Contracts.

Smith on Contracts.
Anson on Contracts.

Real Property.

Williams on Real Property, Leith's edition.

Common Law.

Broom's Common Law.
Kerr's Student's Blackstone, Books 1 and 3.

Equity.

Snell's Principles of Equity.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

SECOND YEAR.

Criminal Law.

Kerr's Student's Blackstone, Book 4.
Harris's Principles of Criminal Law.

Real Property.

Kerr's Student's Blackstone, Book 2.
Leith & Smith's Blackstone.
Deane's Principles of Conveyancing.

Personal Property.

Williams on Personal Property.

Contracts and Torts.

Leake on Contracts.
Bigelow on Torts—English Edition.

Equity.

H. A. Smith's Principles of Equity.

Evidence.

Powell on Evidence.

Canadian Constitutional History and Law.

Bourinot's Manual of the Constitutional History of Canada. O'Sullivan's Government in Canada.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to the above subjects as shall be prescribed by the Principal.

THIRD YEAR.

Contracts.

Leake on Contracts.

Real Property.

Dart on Vendors and Purchasers.
Hawkins on Wills.
Armour on Titles.

Criminal Law.

Harris's Principles of Criminal Law.
Criminal Statutes of Canada.

Equity.

Lewin on Trusts.

Torts.

Pollock on Torts.
Smith on Negligence, 2nd edition

Evidence.

Best on Evidence.

Commercial Law.

Benjamin on Sales.
Smith's Mercantile Law.
Chalmers on Bills.

Private International Law.

Westlake's Private International Law.

Construction and Operation of Statutes.

Hardcastle's Construction and Effect of Statutory Law.

Canadian Constitutional Law.

British North America Act and cases thereunder.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

During the School term of 1890-91, the hours of lectures will be 9 a.m., 3.30 p.m., and 4.30 p.m., each lecture occupying one hour, and two lectures being delivered at each of the above hours.

Friday of each week will be devoted exclusively to Moot Courts. Two of these Courts will be held every Friday at 3.30 p.m., one for the Second year Students, and the other for the Third year Students. The First year Students will be required to attend, and may be allowed to take part in one or other of these Moot Courts.

Printed programmes showing the dates and hours of all the lectures throughout the term, will be furnished to the Students at the commencement of the term.

GENERAL PROVISIONS.

The term lecture where used alone is intended to include discussions, recitations by, and oral examinations of, students from day to day, which exercises are designed to be prominent features of the mode of instruction.

The statutes prescribed will be included in and dealt with by the lectures on those subjects which they affect respectively.

The Moot Courts will be presided over by the Principal or the Lecturer whose series of lectures is in progress at the time in the year for which the Moot Court is held. The case to be argued will be stated by the Principal or Lecturer who is to preside, and shall be upon the subject of his lectures then in progress, and two students on each side of the case will be appointed by him to argue it, of which notice will be given at least one week before the argument. The decision of the Chairman will be pronounced at the next Moot Court, if not given at the close of the argument.

At each lecture and Moot Court the roll will be called and the attendance of students noted, of which a record will be carefully kept.

At the close of each term the Principal will certify to the Legal Education Committee the names of those students who appear by the record to have duly attended the lectures of that term. No student will be certified as having duly attended the lectures unless he has attended at least five-sixths of the aggregate number of lectures, and at least four-fifths of the number of lectures of each series during the term, and pertaining to his year. If any student who has failed to attend the required number of lectures satisfies the Principal that such failure has been due to illness or other good cause, the Principal will make a special report upon the matter to the Legal Education Committee. For the purpose of this provision the word "lectures" shall be taken to include Moot Courts. Examinations will be held immediately after the close of the term upon the subjects and text books embraced in the Curriculum for that term.

The percentage of marks which must be obtained in order to pass any of such examinations is 55 per cent. of the aggregate number of marks obtainable, and 29 per cent. of the marks obtainable on each paper.

Examinations will also take place in the week commencing with the first Monday in September for students who were not entitled to present themselves for the earlier examination, or who having presented themselves thereat, failed in whole or in part.

Students whose attendance at lectures has been allowed as sufficient, and who have failed at the May examinations, may present themselves at the September examinations at their own option, either in all the subjects, or in those subjects only in which they failed to obtain 55 per cent. of the marks obtainable in such subjects. Students desiring to present themselves at the September examinations must give notice in writing to the Secretary of the Law Society, at least two weeks prior to the time fixed for such examinations, of their intention to present themselves, stating whether they intend to present themselves in all the subjects, or in those only in which they failed to obtain 55 per cent. of the marks obtainable, mentioning the names of such subjects.

Students are required to complete the course and pass the examination in the first term in which they are required to attend before being permitted to enter upon the course of the next term.

Upon passing all the examinations required of him in the School, a Student-at-Law or Articled Clerk having observed the requirements of the Society's Rules in other respects becomes entitled to be called to the Bar or admitted to practise as a Solicitor without any further examination.

The fee for attendance for each Term of the Course is the sum of $10, payable in advance to the Secretary.

Further information can be obtained either personally or by mail from the Principal, whose office is at Osgoode Hall, Toronto, Ontario.

The Canada Law Journal.

VOL. XXVII. OCTOBER 1, 1891. No. 15.

WE would call the attention of our readers to the full report to be found in the *Albany Law Journal*, vol. 44, p. 86, of a case defining the law of easements in regard to companies utilizing electricity and operating in the public streets, which we have noted *post* p. 479.

AMONG the Acts passed at the last session of the British Parliament was that known as the Slander of Women Bill, which enacts that an imputation on a woman's chastity is actionable without proof of special damage. This is one of the numerous instances in which our legislatures are in advance of the old land's. The matter of this bill became law with us by c. 14 of 52 Vict. (Ont.). Our Act is a little wider, and provides for the giving of security for costs and for examination of parties immediately after the delivery of the statement of claim, provisions which do not occur in the English Act.

DOWER IN MORTGAGED ESTATES.

In the late case of *Pratt* v. *Bunnell*, 21 Ont. 1, Street, J., in delivering the judgment of the Divisional Court, says that the decision arrived at is opposed to the view taken by Patterson, J.A., in *Martindale* v. *Clarkson*, 6 A.R. 1; by the Chancellor in *Re Croskery*, 16 Ont. 207; and by Ferguson, J., in *Re Hague*, 14 Ont. 660. We are, however, somewhat inclined to doubt whether there is really any such judicial conflict of opinion.

In *Pratt* v. *Bunnell* a mortgage had been given for purchase money, and the wife of the mortgagor had joined in the mortgage to bar her dower; and the question the court had to decide was whether, after payment of the mortgage debt, the wife's dower was to be calculated on one-third of the whole value of the land, or only on one-third of the surplus remaining after payment of the mortgage.

The Court came to the conclusion that the wife was only dowable in that case out of the surplus; which conclusion, if confined to the case of mortgages for purchase money, we believe to be a perfectly correct exposition of the statute; but if it be intended to apply that rule to other cases than mortgages for purchase money, we think it open to doubt, and in that case it certainly would be opposed to the previous decisions above referred to. The *obiter dictum* of Patterson, J.A., in *Martindale* v. *Clarkson*, referred to by Street, J., does not appear to be maintainable as a general proposition applicable to all cases. Speaking of the new right conferred on dowresses by the Act of 1879, he says, "To such dower the Legislature applies the rule adopted by the Court of Chancery in *Robertson* v.

Robertson, 25 Gr. 486, estimating it upon the whole value of the land and not on the surplus over the incumbrance." Applied to the case in hand, viz., a mortgage given to secure an advance and not for purchase money, the statement is perfectly correct; but there is nothing in the case to indicate that the learned judge had the case of a mortgage for purchase money in mind, or that he would have held that the same rule applied to such mortgages. In neither of the other cases, *Re Croskery* and *Re Hague*, were the mortgages in question given for purchase money—nor do we find anything in these cases to indicate that the learned judges who decided them had in view the case of mortgages for purchase money.

As Street, J., points out, there was a clear distinction before the Act of 1879 in the rights of a wife to dower in land subject to mortgage where the mortgage was given to secure the purchase money of the mortgaged land, and where the mortgage was given to secure a loan or a debt other than purchase money. *Campbell* v. *Royal Canadian Bank*, 19 Gr. 334, had settled that in the case of a mortgage for purchase money the dower was to be calculated only on the value of the equity of redemption; whereas, where the mortgage was not given to secure purchase money, *Doan* v. *Davis*, 23 Gr. 207, and *Robertson* v. *Robertson*, 25 Gr. 486, had settled that the wife's dower was to be calculated on the basis of the whole value of the land. This distinction the Act of 1879 does not appear to us to be intended to disturb, and notwithstanding the verbal criticism which Street, J., has applied to s. 6, we are disposed to think it is framed for the very purpose of preserving this distinction. That section provides that in the event of the sale of the mortgaged land, the dowress is to be "entitled to dower in any surplus of the purchase money arising from such sale which may remain after satisfaction of the claim of the mortgagee or grantee, to the same extent as she would have been entitled to dower in the land from which the surplus purchase money shall be derived had the same not been sold."

The words "to the same extent" appear to us to indicate that the Legislature had in view the fact that the extent to which a widow in the then state of the law was entitled to dower in mortgaged land was not in all cases the same, but varied according to the nature of the purpose for which the mortgage had been given, and the use of these words seems to us plainly to show that it was not intended to interfere with that distinction. Had it been intended to lay down a rule to be applied to all cases, irrespective of the previously well-established distinction, we are disposed to think that the language would have been different. The draughtsman probably had in view when using the words "had the same not been sold" a case of administration where, without a sale of the mortgaged land, it becomes necessary to adjust the rights of the parties, and to determine to what extent and for what amount the dowress is entitled to dower.

The dower, on whatever basis it is calculated, can, in the event of a sale, only be payable out of the surplus; but if it were intended in all cases to confine the dowress' claim to one-third of the surplus, it was certainly easier to say so than to use the phraseology actually adopted, which, to our mind, plainly enough implies that the Legislature contemplated the fact that the extent to which a widow is entitled to dower depends on the circumstances of each case.

In our view of the case, *Pratt* v. *Bunnell* is not in conflict with the previous decisions (except that of *Calvert* v. *Black*, 8 P.R. 255), but merely establishes an exception to the general rule, which existed before the Act of 1879, and which was not, as we venture to think, intended to be in any way interfered with by that Act.

LEGAL STATISTICS FOR 1890.

The Report of the Inspector of Legal Offices for the year 1890 shows that there was a sensible diminution in the volume of litigation compared with the previous year so far as the number of suits is concerned. In 1889 the total number of writs issued was 7067, while in 1890 the figure reached is only 6940. But while the number of writs is considerably smaller, the amount sued for seems to have been very considerably larger: thus in 1889 the writs were indorsed for $7,550,422.07, and in 1890 for $9,288,656.44.

The number of judgments entered without trial in the outer counties in 1889 was 1822, and the amount recovered thereby $1,942,567.39; while in 1890 the number of judgments fell to 1240, and the amount of them to $1,235,603.06. In 1890 the number of judgments entered in the High Court in the outer counties, after trial, was 406, as against 623 in 1889, and the amount of such judgments in 1889 was $498,816.95, against $141,827.82 in 1890. These figures, it will be observed, do not include the city of Toronto; it is therefore impossible to institute a comparison between the total number of suits commenced and the number of judgments recovered. So far as the outer counties are concerned, of the sum of $9,288,656.44 for which writs were issued only $1,377,430.88 was recovered by judgments entered in the outer counties. Is it to be supposed that judgments in respect of the other eight millions of dollars of claims were recovered in Toronto? Unfortunately the Inspector's duties do not extend to the Toronto offices, and his report, therefore, furnishes very few *data* for a comparison between the legal business transacted in the outer counties and in Toronto respectively.

It is a very curious fact that notwithstanding the enormous sums for which actions are commenced in the course of a year, a comparatively very small portion of it is recovered under execution or by sales under other legal process. Thus although executions were issued against goods in the High Court of Justice during 1890 for $3,135,751.93, only the sum of $40,377.70 was actually realized by the sheriffs by sales, and the sum of $54,329.09 without sales, making the total realized under executions only $94,706.79, or not quite $\frac{1}{31}$ part of the amount required to be levied. It is to be hoped that this does not represent the actual fruit of the litigation. The amounts realized by sales in the Masters' offices do not account by any means for the difference between the amount sued for and the amount recovered. In 1889 $390,974 was realized in this way, and in 1890 $416,914.84.

The profession will be interested to learn that the proportion between the taxed fees and disbursements is about equal, and for every dollar of profit costs

a solicitor can earn in a litigated suit he must be prepared to disburse another dollar. This is certainly a very heavy outlay, and it is doubtful whether any other professional business is carried on on such disadvantageous terms.

Some interesting figures are to be gathered from the Surrogate Court returns, from which we learn that during the past year the value of the personalty devolving aggregated $15,435,107.13, as against $12,299,582.15 in 1889; and the value of the realty devolving under the Devolution of Estates Act aggregated $4,679,177.56, as against $3,773,939.47 in 1889; there being in both classes of property a very considerable increase in amount during the past year. We find that there were only 14 estates where the personalty was over $100,000.

As an almost necessary result of the practical operation of the Devolution of Estates Act, the number of administration actions is dwindling away by degrees. In 1885 we find that in the outer counties 55 administration orders were made upon summary applications; in 1886 there were 62; in 1887 there were 50; in 1888, 42; in 1889 there were 33; and in 1890, 25. These returns of course do not include the city of Toronto, and therefore we are unable to see what has been the full extent of the falling off of this class of actions. The change in the law which has been effected by the Devolution of Estates Act we believe has been beneficial both to the profession and the public; and it is not often that it can be said of any legislation that it is beneficial to both the lay and professional classes of the community. It does not follow that because it is now possible to wind up estates without the necessity of an administration action that therefore the services of the lawyer can be dispensed with: his aid is almost invariably sought, and instead of having to lay out a dollar for every dollar he earns, he is able to earn just as much without having to lay out in disbursements anything like the same amount of money, and at the same time he has the satisfaction of presenting a much less heavy bill of costs to his client than he would have in the case of litigation.

Notwithstanding these crumbs of comfort, the fact cannot but occasionally present itself to the mind of the practitioner that, by reason of the constant influx of at least 100 new members every year into the ranks of the profession, the competition for business is constantly increasing, and its increase in bulk does not by any means keep pace with the increase in the numbers of the competitors.

JUDICIAL SALARIES.

We are glad that the leader of the Government has announced his intention of bringing in a measure next session to increase the salaries of the judges. It is to be hoped that he means business. There is no question as to what his own views are, but he sees difficulties in the way which his predecessor was unable to overcome. We trust Mr. Abbott may be more successful. We reproduce his remarks *in extenso:*

He says: "The subject of this discussion is certainly well worthy of the time that has been taken up, and the Government is very sensible, and has been for some time, of its importance and of the necessity of dealing with it.

It has already made a serious effort within the last two or three years to do so, unsuccessfully, in consequence of the great difference of opinion which appears to exist in the representative body as to the position the judges should hold with regard to salary. It appears to me that the discussion which has taken place here affords a very excellent object lesson as to the extent of these difficulties. While almost every hon. gentleman thinks the salaries of the judges should be increased, the views as to the extent and nature of that increase are as numerous as the number of gentlemen who spoke on the subject. It is this kind of difference of opinion—and, in fact, there are many kinds of differences of opinion about this subject—which renders it so exceedingly difficult to deal with. In the House of Commons, where a measure was introduced for the purpose of increasing the salaries, the diversity of opinion was so strong, and finally the opposition was so strong, that it was found impossible to proceed with the Bill. Now, to-day my hon. friend on my left thinks evidently that the salaries are large enough, that there were as good judges in his province at $2,400 a year as there are now at $4,000 a year, and I think that is very probable. For I remember, at a shorter date probably than my hon. friend himself could remember, when a man could live in this country for one-half the amount he can live on now—when the fortunes which judges, in attempting to maintain their social rank, had to compete with were not one-tenth or one-hundredth part of what they are now. It is not so long ago when the sight of a millionaire would have attracted crowds in the street; now there is not a town in the country where you could not find men who are several times millionaires. The cost of living is greater. Men threaten a change of dynasty or a reconstruction of society because they do not get the same price for eggs as they got last year. But eggs this year were three or four times as costly as they were in those years. And so with regard to other articles of food, and to clothing. It may be that in some respects the necessaries of life have not increased, but the requisites for maintaining one's social position have increased tenfold, and it is impossible, as hon. gentlemen concur in saying, for the best men in the country to be induced to take positions on the bench at the rates which we now pay in the larger centres of business and trade. My hon. friend from Ottawa appears to compare to some extent the rate of payment which we give our judges with the salaries paid on the other side of the line. In some respects my hon. friend is quite right. The salaries paid there to judges of the courts in certain centres of business are three or four times as much, in some instances, as those paid to judges in some of the important centres of this country. But there are many reasons for that, not the least of which is the very high rate of living which is rendered necessary on the other side of the line in consequence of the enormous taxation. There, the cost of everything required for living is much greater than it is here; and the other reasons to which I have alluded prevail even more strongly there than here. There the fortunes are enormous, and in the competition for social position there, even with the liberal salaries allowed the judges, they are practically nowhere. However, in a moderate way there is no doubt whatever that an increase in the salaries of our judges is necessary. Whether it shall be particu-

larly in favor of one class of judges or another class of judges, or what the amount of increase shall be, are questions which, of course, will have to be dealt with in detail. It is the intention of this Government next session to attempt to deal with the subject in a manner which they hope will be satisfactory to the country; but I must say this, that without some little compromise of views, and some little sacrifice of personal ideas about judges, we should have difficulty in passing the most admirable measure in the world even in this House, where the easiness of the circumstances of its members and their independent position renders them more unlikely to criticize a liberal payment to judges than perhaps members might do in another place. Such a measure as the Government, with the most careful consideration of the question, can prepare, they propose to bring down next session."

Several members in the House of Commons have already put themselves on record against any increase. That is to be expected. There are always those who think it desirable to pander to an ignorant and foolish prejudice against lawyers, as a class, and who are unable to see the immense injury done to the public by inferior men being placed in judicial positions. It requires no intelligence to see that this must be the necessary result of not providing adequate remuneration for those who ought to occupy seats on the bench. Those in authority who refuse to see this and act accordingly assume a grave responsibility and do grievous wrong to their constituents and their country.

COMMENTS ON CURRENT ENGLISH DECISIONS.

SOLICITOR—TAXATION OF COSTS—TAXATION AFTER PAYMENT—"SPECIAL CIRCUMSTANCES"—6 & 7 VICT. c. 73, ss. 38, 41. (R.S.O., c. 147, ss. 43, 46).

In re Cheesman (1891), 2 Ch. 289, the Court of Appeal (Lindley, Bowen, and Kay, L.JJ.) declined to interfere with the discretion of Kekewich, J., in granting an order for taxation of a solicitor's bill after payment, under the following circumstances: The solicitor was acting for a mortgagee; the mortgagor had sold the property, and the purchasers were pressing for completion; the solicitor refused to deliver up the deeds unless his costs were paid; the mortgagor objected to the amount, but in order to get the sale completed paid, under protest, the sum the solicitor agreed to accept, and within a month applied for taxation of the bill. Both Lindley and Kay, L.JJ., however, expressed doubts whether they themselves would have granted the order in the first instance, but they considered there were "special circumstances," and it was for the judge of first instance to say whether they were sufficient.

LIBEL—INTERLOCUTORY INJUNCTION.

Salomons v. *Knight* (1891), 2 Ch. 294, is another case in which an application was made for an interlocutory injunction to restrain the publication of a libel. In this case the defendant had previously published a libel against the plaintiff, for which he had been sued and judgment given against him for £1000 damages, which the plaintiff had been unable to recover. The defendant continued to

publish documents repeating the same charges, but inasmuch as the plaintiff failed to make out that there was any reason to apprehend any immediate danger of injury to the plaintiff in person or property, North, J., declined to grant an interlocutory injunction, and his decision was affirmed by the Court of Appeal (Lindley, Bowen, and Kay, L.JJ.).

INFANT—GUARDIAN—RELIGIOUS EDUCATION—ANTE-NUPTIAL AGREEMENT AS TO RELIGION OF THE CHILDREN—WISHES OF DECEASED PARENTS—COSTS.

In re Nevin (1891), 2 Ch. 299, was an application for the appointment of a guardian to a penniless infant in which two questions were raised: first, who should be appointed guardian, and, second, in what religion the child should be brought up. The father was a Protestant who had married a Roman Catholic, and by an ante-nuptial agreement had agreed that the children of the marriage should be brought up Roman Catholics. The child was the only issue and had been baptized by a Roman Catholic priest. When the child was three years old the father, who was in destitution, died at the house of Miss Martin, a Protestant cousin of the wife. The father on his death-bed had commended his wife and child to Miss Martin, but had appointed no guardian. Soon after his death the child, with the consent of the mother, who was statutory guardian, went to live with and was maintained by Miss Martin, with whom she remained until she was seven, and there was a strong attachment between them. The mother then died without appointing a guardian, and after her death her brother, who was a Roman Catholic, took the child away from Miss Martin by force and sent her to America, whence she was brought back under *habeas corpus* proceedings instituted by a Protestant brother of the father. Nothing had been said to Miss Martin by either father or mother as to the religious education of the child. The Court of Appeal (Lindley, Bowen, and Kay, L.JJ.) held (affirming Chitty, J.) that, as the child had no guardian, the Court had only to consider what was best for the child's welfare, having due regard to the wishes of the father as to her religious education; that the ante-nuptial agreement was not binding on the father, and though he acted in his life on the view that the child was to be brought up a Roman Catholic he was at liberty to change his mind, and that it could not be inferred in the events that had happened that he would have wished the child to be removed from Miss Martin's care to be brought up a Roman Catholic—a course which, in the opinion of the Court, would not be for the child's benefit. Miss Martin was therefore appointed guardian, with power to bring up the child as a Protestant.

COMPANY—WINDING UP—RESERVE FUNDS—UNDRAWN PROFITS—SURPLUS ASSETS OF COMPANY, DIVISION OF—CONTRIBUTORIES, RIGHTS OF, INTER SE—CAPITAL—INCOME.

In re Bridgewater Navigation Co. (1891), 2 Ch. 317, the question as to when undrawn profits can be treated as capital is discussed by the Court of Appeal (Lindley, Lopes, and Kay, L.JJ.), and the decision of North, J., (1891), 1 Ch. 155 (see *ante* p. 136), was varied. The question arose on the winding-up of a canal company. Pursuant to the articles of association, the directors had from time to time set apart out of the profits divers sums which had been placed to

the credit of reserve funds to meet (*a*) depreciation of steamers, (*b*) insurance, and (*c*) canal improvements. These reserve funds were not represented by any separate or specific investments, but were merely bookkeeping entries. The company's undertaking had been sold and a voluntary winding-up agreed to, and at the date of the sale three funds representing these reserve funds were standing in the company's books. North, J., it may be remembered, held that only the fund standing to the credit of the canal improvements was divisible as "profits," and that the other two funds did not represent "profits," and were divisible as capital between both the ordinary and preference shareholders. There was also the further question, whether for the broken period between the last dividend day and the completion of the sale of the undertaking the ordinary shareholders were only entitled to the actual profits made, or also to the difference between the actual value of the company's assets and the value at which they had been estimated in the company's last balance sheet, as being undrawn profits. North, J., held that they were only entitled to the actual profits made. The Court of Appeal differed from him on both points, being of opinion that all three reserve funds were undrawn profits and divisible as such, and also that the difference between the actual and the estimated value of the assets was also to be treated as undrawn profits.

HUSBAND AND WIFE—WIFE'S EQUITY TO A SETTLEMENT—ASSIGNMENT BY HUSBAND OF FUND—RIGHTS OF ASSIGNEE OF HUSBAND AS AGAINST WIFE.

In *Roberts* v. *Cooper* (1891), 2 Ch. 335, a married woman was entitled to a reversionary interest in two sums of £500 under the will of her father and grandfather respectively. In 1864 these interests were put up for sale and sold to a purchaser for £170, which was paid to the wife: the husband and wife executed an assignment to the purchaser, and it was acknowledged by the wife before commissioners, but the assignment by the wife was nugatory. The assignee neglected to notify the trustees of the will of the grandfather, and they having no notice of the assignment paid the £500 due under this will to the husband and wife, and it was expended by the husband in the maintenance of his family. The other £500 was in Court and was claimed by the assignee, the wife claiming to be entitled to a settlement, her husband being in poor circumstances and she having no other means. Kekewich, J., ordered the whole fund to be settled: but the Court of Appeal (Lindley, Bowen, and Kay, L.JJ.) thought he had gone too far, and though the assignment was invalid as against the wife it was valid as to her husband's interest, and that under the circumstances their receipt of the £500 under the grandfather's will was a special circumstance to be taken into account in determining what part of the fund in question should be settled: and the assignee assenting to one-half of it being settled, they varied the order of Kekewich, J., accordingly.

PRACTICE—PARTIES—ADMINISTRATION ACTION—RULES 133, 170 (ONT. RULES 324, 329).

In re Harrison, Smith v. *Allen* (1891), 2 Ch. 349, at the hearing of the action, which was for a general account against a surviving executor and trustee, it was objected by the defendant that the account could not be directed because the

representative of a deceased executor and trustee was not made a party; but Chitty, J., held that it was not necessary for the plaintiff to make him a party, and that if the defendant desired to have him made a defendant, he should have proceeded under Rules 133, 170 (Ont. Rules 324, 329).

ADMINISTRATION ACTION—SOLICITOR TRUSTEE—JURISDICTION.

In re Thorpe, Vipont v. *Radcliffe* (1891), 2 Ch. 360, was an action against two executors and trustees for administration of their testator's estate. One of the defendants was a solicitor who had assigned his business to other solicitors who acted for the defendants in the action and taxed costs, and under an arrangement with the solicitor trustee paid half the profit costs to him. The party having the conduct of the action applied on motion to compel the solicitor trustee to account for the half of the profit costs so received by him; but North, J., though thinking the defendant liable to account for the moneys so received if an action were brought against him, considered that he had no jurisdiction to make the order asked upon motion in the administration action.

COSTS—REDEMPTION ACTION—SOLICITOR MORTGAGEE, RIGHT OF TO COSTS.

In *Stone* v. *Lickorish* (1891), 2 Ch. 363, Stirling, J., held that in a redemption action against a solicitor mortgagee who defends in person the solicitor is entitled to costs out of pocket, but not to remuneration for personal trouble, and that the objection need not be taken at the hearing, but may be taken on the taxation, after judgment in the usual form containing the common order to tax costs. In this latter point he followed *Cradock* v. *Piper*, 1 Mc. & G. 664, in preference to *Price* v. *McBeth*, 33 L.J. Ch. 460.

NUISANCE—NOISE—WATER COMPANY—NEGLIGENCE INJUNCTION.

Harrison v. *Southwark & Vauxhall Water Co.* (1891), 2 Ch. 409, was an action brought by the plaintiff for an injunction and damages. The defendants were a water company, and in pursuance of their statutory powers had sunk a shaft on land adjoining the plaintiff's, and for this purpose employed lift pumps, which caused considerable noise and interfered with the plaintiff's comfort. These pumps were kept in use day and night for three weeks. The defendants might have used a pump which would have created less noise, but it was not usual to do so, and it would have been inconvenient for the purpose at the early stage of the work, but they substituted the less noisy kind of pump after that stage had been passed. Vaughan Williams, J., before whom the action was tried, refused the plaintiff the relief claimed, holding that the annoyance, being temporary and for a lawful object, did not amount to a nuisance at law, and also that the authority conferred on the defendants to sink the shaft enabled them to do all things reasonably necessary for the execution of the work. The action was therefore dismissed.

BILL OF EXCHANGE—NEGLIGENCE—BANKER—FORGERY OF NAME OF PAYEE—PAYEE "A FICTITIOUS OR NON-EXISTING PERSON"—BILLS OF EXCHANGE ACT (45 & 46 VICT., C. 61), S. 7, S-S. 3 (53 VICT., C. 33, S. 7, S-S. 3, (D.).

The most important case in the appeal cases is *The Bank of England* v. *Vagliano* (1891), A.C. 107, which we have noticed in its previous stages, *ante*

vol. xxv., pp. 146, 464. The case has presented a singular conflict of judicial opinion. Charles, J., and an exceptionally numerous Court of Appeal (viz., Cotton, Lindley, Bowen, Fry, and Lopes, L.JJ.) were in favor of Vagliano, and with them agreed Lords Bramwell and Field, in the House of Lords; but Lord Halsbury, L.C., and Lords Selborne, Watson, Herschell, and Morris agreed with Lord Esher, M.R., and decided in favor of the defendants, although their reasons for so doing are by no means identical. The case, it may be remembered, was one in which the Bank of England had paid a number of documents which purported to be bills of exchange, and which though actually accepted by the plaintiffs Vagliano were forged, so far as the names of the pretended drawers and payees were concerned, and the question was whether the Bank or the plaintiffs were to bear the loss. How far the Bills of Exchange Act could be applied to documents which were not in fact bills of exchange became therefore a material question. There was also another element in the case which had a material bearing on the result: not only had the plaintiffs actually accepted the fraudulent documents, but the forger had also induced them from time to time to sign notices to the Bank advising them of the time when the pretended bills would become payable. Although the documents were not in fact bills of exchange, yet the House of Lords decided that the provisions of the Bills of Exchange Act applied to them, and applying the provisions of the Act they held that the payees were fictitious persons within the meaning of the Act, notwithstanding that there were in fact persons and firms in existence of the same names, because it was never intended that the actual persons or firms should have, nor did they have, any connection with the documents, and they also held that it was not necessary that the payees should be fictitious to the knowledge of the acceptors. Lords Bramwell and Field, however, took the view that the Bank could not charge the plaintiffs with the sums in question, because the person to whom the pretended bills were paid had no right of action against the acceptors. They also considered that the payees were not fictitious persons, and therefore that the pretended bills could not be treated as payable to bearer.

ADMINISTRATION—EXECUTORS CARRYING ON BUSINESS OF TESTATOR—EXECUTORS' RIGHT TO INDEMNITY—CREDITORS OF TESTATOR, AND CREDITORS OF EXECUTORS, RIGHTS OF.

Dowse v. *Gorton* (1891), A.C. 190, is an appeal to the House of Lords from the decision of the Court of Appeal, 40 Ch.D. 536 (noted *ante* vol. xxv. p. 301). The point in controversy arose out of the executors of a deceased person having, pursuant to a power in his will in that behalf, carried on the testator's business for three years with the assent of the testator's creditors, and in their interest, as well as that of the beneficiaries: the business was properly carried on. The Court of Appeal had held that the executors were entitled to indemnity for liabilities incurred in carrying on the business, in priority to the testator's creditors, only as to those assets acquired in carrying on the business; but the House of Lords (Lords Herschel, Macnaghten, and Hannen) decided that the executors' right to indemnity extended to the whole estate, and was prior to the claims of the testator's creditors, and the judgment of the Court of Appeal was affirmed

with this variation. We think the conclusion their Lordships have arrived at is more satisfactory than that of the Court of Appeal, which certainly placed the executors in the very awkward dilemma of either refusing to carry out the express directions of the testator, or doing so at the risk of incurring a serious liability.

PRACTICE—REFUSAL OF LEAVE TO APPEAL—"ORDER OR JUDGMENT."

In *Lane* v. *Esdaile* (1891), A.C. 210, the House of Lords determined that no appeal lies from the refusal of the Court of Appeal to give leave to appeal because such refusal is not "an order or judgment" of the Court of Appeal.

TRADE MARK—INJUNCTION—FRAUDULENT USE OF NAMES—INTENTION TO DECEIVE PUBLIC.

In *Montgomery* v. *Thompson* (1891), A.C. 217, the House of Lords affirmed the decision of the Court of Appeal, 41 Ch.D. 35 (noted *ante* vol. xxv., p. 363), granting a perpetual injunction against the defendant's using the words "Stone Ale" in the description of ale made by him at a place called "Stone," the Court being of opinion that the plaintiff by usage had acquired the right to use the words "Stone Ale," and that the defendant was fraudulently endeavoring to deceive the public and to pass off his goods as the plaintiff's.

TORRENS TITLE—FORGED TRANSFER—FICTITIOUS TRANSFEREE—FORGED MORTGAGE—EFFECT OF REGISTRATION—COMPENSATION.

Gibbs v. *Messer* (1891), A.C. 248, is an appeal from the Supreme Court of Victoria, and is a case deserving of attention, as it is a decision under what is known as the Torrens Act, which has been partially adopted in Ontario. The case is of considerable importance and was twice argued before the Privy Council. The facts of the case were that the plaintiff, who resided in Scotland, was registered owner of land in Victoria, free from incumbrances. Her certificate of title was left in the hands of a solicitor named Creswell, who also had possession of a power of attorney whereby Mrs. Messer authorized her husband to sell the land. During the absence of Mr. and Mrs. Messer, Creswell forged a transfer by Mr. Messer as his wife's attorney to Hugh Cameron, of North Hamilton, grazier, there being no such person in existence. Creswell then represented himself as agent for Cameron, produced the transfer to the registrar, and also Mrs. Messer's certificate, and the latter was cancelled and Cameron registered as owner. Still professing to be Cameron's agent, Creswell obtained a loan from McIntyre of £3000 upon a mortgage purporting to be executed by Cameron, but really forged, and of which Creswell was the subscribing witness. This mortgage was registered against the land. The frauds were subsequently discovered, and Mrs. Messer then applied to be restored to the register as the owner of the land, and to cancel the transfer to Cameron and the mortgage to McIntyre. The Registrar of titles, the McIntyres, and Creswell, were defendants. The colonial Court affirmed the validity of the mortgage as against Mrs. Messer, and gave her leave to redeem on payment of the amount due with costs, to be repaid to her out of the land titles assurance fund. From this the Registrar of titles appealed. Their Lordships, while holding that if Hugh Cameron had been a real

person and had actually signed the mortgage to the McIntyres, the latter would have been entitled to hold the mortgage as against Mrs. Messer; yet as there was no such person, and Hugh Cameron was a mere "myth," they held that the mortgage was absolutely invalid and gave the mortgagees no right to be indemnified either by Mrs. Messer or out of the assurance fund. Although the reasoning of the Privy Council may be more logical than that of the colonial Court, we are inclined, nevertheless, to think that the decision of the latter was probably a better practical conclusion, and more in accordance with the spirit of the Torrens system of registration of titles, which, we take it, is intended to indemnify persons honestly acquiring registered interests in registered land. The advocates of the system have claimed that a person *bonâ fide* advancing his money for the purchase, or by way of loan on the security, of registered land, and procuring himself to be registered as owner or mortgagee, is absolutely protected from loss; but the present decision shows that even under this system risks have to be run by purchasers and mortgagees, and the mere fact that the Registrar registers them as owners or mortgagees is not sufficient to secure them from loss.

MARRIAGE SETTLEMENT—LIMITATION IN FAVOR OF ILLEGITIMATE CHILD—SUBSEQUENT CONVEYANCE BY SETTLOR.

In *DeMestre* v. *West* (1891), A.C. 264, the effect of a limitation in a marriage settlement in favor of an illegitimate child of the settlor, and the power of a settlor to defeat it by a subsequent conveyance to a purchaser for value, is discussed by the Judicial Committee of the Privy Council, on appeal from the Supreme Court of New South Wales. Their Lordships held that the law was clear that an illegitimate child was in the position of a mere volunteer, and that a subsequent conveyance would defeat the limitation in the absence of any special circumstances to take the case out of the rule, unless such result would have the effect of defeating other limitations within the marriage consideration. A special agreement of the parties to the settlement in favor of the limitation, and acceptance by one of the parties of different interests in the settled property from those which the law would have given, and the omission to provide in the settlement for all or some of the issue of the marriage, were held not to be circumstances sufficient to take the case out of the general rule. Their Lordships followed the decision of *Mackie* v. *Herbertson*, 9 App. Cas. 303, and dissented from *Clarke* v. *Wright*, 6 H. &. N. 849.

ALIEN CAPITATION TAX—EXCLUSION OF ALIENS—PAYMENT OF ALIEN TAX.

Musgrove v. *Chun Teeong Toy* (1891), A.C. 272, raises a question which may ere long be of interest in Canada. By the Victorian Chinese Act, a Chinese immigrant has no right to land in the colony until a sum of £10 has been paid for him. The master of a vessel had committed an offence under the Act by bringing a greater number of Chinese immigrants (among whom was the plaintiff) into a port of the colony than the Act allows. The master tendered payment of £10 for the plaintiff to the collector of customs, but this the officer refused to receive. The action was brought to test whether the colonial government, as representing Her Majesty, had power to prevent the plaintiff from landing on

the shores of the colony under the circumstances. Their Lordships held, overruling the colonial Court, that the collector of customs was under no obligation to accept payment tendered by the master for any of the immigrants so illegally brought into port by him, whether tendered for such immigrants collectively or individually; and further, that altogether apart from the Act an alien friend has not a legal right, enforcible by action, to enter British territory.

The Law Reports for August comprise (1891) 2 Q.B., pp. 109-369, (1891) P., pp. 293-301, and (1891) 2 Ch., pp. 413-605.

STATUTE—CONSTRUCTION—"STREETS"—"PASSAGES."

The Queen v. *Goole* (1891), 2 Q.B. 212, was a case in which the construction of a statute was in question. A municipal body having power under a statute to pass by-laws regulating the width of new "streets," which term was by the Act defined to include "any passage, whether a thoroughfare or not," passed a by-law that all new streets should be not less than 10 ft. wide. Plans were submitted to the municipal body showing passage ways 6 ft. wide, which were primarily intended to be used for clearing out rubbish and ash-pits in the rear of houses, but the ways were such as the public might acquire a right of passage over. The municipal body refused to approve of the plans, and an application for a mandamus was then made to compel their approval; and it was held that the ways in question were "passages," and therefore within the definition of streets, and consequently, being less than 10 ft. in width, were contrary to the by-law, and the application was therefore dismissed by Day and Lawrance, JJ.

SHERIFF, NOTICE TO—SHERIFF'S BAILIFF IN POSSESSION.

Bellyse v. *McGinn* (1891), 2 Q.B. 227, although a bankruptcy case, may nevertheless be briefly noticed here. In this case the question was whether due notice had been given to the sheriff of a bankruptcy petition, the notice having been given to a man in possession under an execution in the sheriff's hands, and Mathew and V. Williams, JJ., following *ex parte Warren*, 15 Q.B.D. 48, held that a bailiff in possession is not his agent for the purpose of receiving notices of that kind, and therefore notice to him was not notice to the sheriff.

PRACTICE—NON-APPEARANCE OF PLAINTIFF AT TRIAL—JUDGMENT, FORM OF, WHERE PLAINTIFF DOES NOT APPEAR AT TRIAL—RULE 456 (ONT. RULE 673).

In *Armour* v. *Bate* (1891), 2 Q.B. 233, the plaintiff failed to appear at the trial, and the question was, what was the proper form of judgment in such a case. The action was to recover £300 deposited by the plaintiff with the defendant, who was his employer. The defendant admitted the deposit, but alleged it had been made in lieu of a fidelity bond and as an indemnity to the defendant, and the defendant alleged dishonesty or negligence by the plaintiff, entitling the defendant to indemnify himself out of the sum deposited; there was also a counter-claim, which the defendant abandoned. At the trial the judge gave judgment for the defendant, from which the plaintiff appealed, and the Court of Appeal (Lord Esher, M.R., and Lopes and Kay, L.JJ.) held that the

judgment was wrong in point of form; and while dismissing the appeal with costs, they ordered the judgment to be amended so that it might appear thereby that the action was dismissed for default of appearance by the plaintiff at the trial, and so as to correspond with the terms of the Rule 456 (Ont. Rule 673).

PRACTICE—OFFICIAL REFEREE, JURISDICTION OF—COMMISSION TO EXAMINE WITNESSES, POWER OF REFEREE TO ORDER—RULES 472, 473, 474 (ONT. RULES 34, 36, 37)—JURISDICTION OF JUDGE.

In *Hayward* v. *Mutual Reserve Association* (1891), 2 Q.B. 236, Denman and Wills, JJ., decided that an official referee to whom an action is referred for trial has under Rules 472-4 (Ont. Rules 34, 36, 37) power to order the issue of a commission to examine witnesses abroad, and that a judge-in-chambers may review his decision either granting or refusing such an order, because he is an officer of the Court, and as such is subject to its control.

ERRATUM.—*Ante* page 425, in *The Queen* v. *Marsden*, for "R.S.C., c. 162, s. 39, the age is ten years," read "53 Vict., c. 37, s. 12, the age is fourteen years."

Notes on Exchanges and Legal Scrap Book.

REFUSAL TO GRANT DEGREE.—The New York Supreme Court holds that a college cannot arbitrarily refuse a degree to a student from whom it has received fees and who has spent the prescribed time and taken the prescribed examinations; that it is not a question of an exercise of their discretion which would be proper, but a wilful violation of the duties they have assumed.—*Cecil* v. *Bellevue, etc., Medical College.*

CARRIERS OF PASSENGERS—REFUSAL TO ACCEPT TICKET.—The Supreme Court of Mississippi holds that where the conductor of a railroad train returns to a passenger the wrong portion of a return ticket, and another conductor on the return trip refuses to accept it after the mistake is explained to him, and ejects the passenger from the train, the railroad company is liable.—*Kansas, etc., Ry. Co.* v. *Riley*, 9 South. Rep. 443.

LIBEL CASES.—The number of libel and slander actions in the Queen's Bench list is certainly remarkable. No less than four were reported on Wednesday morning. The result of *Malan* v. *Young* must prove financially disastrous to everybody concerned, the plaintiff getting a judgment for a shilling on each of two slanders, and no costs, whilst the defendant had, of course, to bear his own costs. Some occupations must be much more remunerative than the law which can admit of such luxuries in litigation.—*London Law Times.*

RELEASE OF DRAWER OF CHEQUE BY CERTIFICATION.—The decisions are now substantially unanimous upon the effect of certification of a cheque as a release of the drawer. The established propositions are:—

1. If the holder of a cheque, after delivery by the drawer, obtains certification instead of payment, the drawer is discharged (*Metropolitan Nat. Bank* v. *Jones*, Supreme Court of Illinois).

2. But if the drawer himself has it certified before delivery—which is frequently done to make it acceptable to his creditor—the certification does not operate as a release.

—*Banking Law Journal.*

A POINT IN GERMAN LAW.—A new palace of justice has been in course of erection at Frankfort-on-the-Maine, and, being duly completed, the various documents and muniments have had to be removed from the old law courts to the new ones. During the process of this removal a bag was discovered containing a bundle of letters, 175 in all, and bearing each one the date 1585. After careful examination, it transpired that the letters were written in Italian, and the superscription of each showed they were intended for persons living in the Netherlands. Considering their age, their preservation has been wonderful, for though the ink has naturally lost much color, and the style of writing is antiquated, yet they can be easily read. In some of the letters, however, remittances for large sums of money were enclosed, and it is with regard to this money that some doubt has arisen. Is the money to be returned to the descendants of the persons who remitted it, or must it be handed over to the heirs of the deceased and departed Dutchmen to whom the money had been forwarded? Possibly the Crown might lay a claim to it, and the acceptance by it of the treasure would certainly be the easiest way out of the difficulty, if not altogether the most equitable.—*The Legal News.*

CHURCH BELLS.—*The Law Journal*, referring to letters in the English press complaining of the noise of church bells, says: "Have they (the writers) any and what remedy at law? The point is one singularly bare of authority. The well-known case of *De Soltau* v. *Held*, 21 Law J. Rep. Chanc. 153, in which both damages were recovered and an injunction granted, is, we believe, the only one to be found in the books on the subject. But in that case the offending bells belonged to a Roman Catholic chapel, and Vice-Chancellor Kindersley appears to have drawn a great distinction between the bells of such a chapel and the bells of a 'church in law,' to which 'bells are an appendage recognised by law, the special property in which is vested in the churchwardens for the benefit of the parishioners at large.' We cannot think, however, that the bells even of a parish church might legally be rung to excess. The churchwardens, we should imagine, could only authorise a reasonable user of them." As we have no state church in this country, our prospects of relief from what is, in many places, a very great annoyance ought to be good. Especially in cities is this intolerable nuisance—for we cannot speak of it otherwise—most felt. It is with a feeling of gratitude that we observe often that the bells of one church are made use of to summon the congregations of several.

PRESUMPTION OF SURVIVORSHIP.—The great difficulty of knowing the exact date of the death of a person drowned, or supposed to be drowned, in some ship-

ping disaster has before now given rise to no little speculation in the realms both of probabilities and of law. Sometimes it is important from the point of view of interest which accrues *de die in diem*, sometimes from that of survivorship. A husband and wife, for instance, start for America in a ship which founders, each having left to the other all his (or her) fortune. Which was the survivor? The husband is the stronger, and is more likely to be able to swim well; but, on the other hand, the chivalry which animates men so often at the point of a tragic death may have secured for the wife a place in a boat or on a plank which would save her awhile from a watery grave. The House of Lords in *Wing* v. *Angrave, Tulley and others*, 30 Law J. Rep. Chanc. 65; 8 H.L. Cas. 183, decided that there was no presumption in the English law from age, sex, or other circumstances, as to the survivorship of one out of several persons who are destroyed by the same calamity. In that case the husband left his property to W. in case his wife should die in his lifetime, and the wife left hers to W. in case her husband should die in her lifetime. Since there was no legal presumption as to which died in the other's lifetime, poor W. took under neither. Conveyancers should guard against the possibility of both dying by the same disaster when a person wants a gift over to take effect in the event of another person not being alive to enjoy it. Would not these words be sufficient: "If the said H. shall not survive or be presumed to have survived me"? *In the goods of James Henry Kirkbride* (Notes of Cases, p. 96), where there was an application to the Court to presume the death of a man supposed to have been lost at sea, Mr. Justice Jeune intimated that it was the established practice to give notice of such application to any assurance office in which the deceased was insured. In "Browne on Probate" (rev. edit., p. 429) it is laid down that "it is desirable to show on affidavit whether or not the life of the deceased was insured," and a *dictum* of Lord (then Sir James) Hannen is cited to the effect that this should be done in every case. So that the practice on such applications will be to show on the affidavit the fact of the existence of the policy, and also to give notice to the office in which that policy was taken out.—*The Law Journal.*

LEGAL DIFFICULTIES IN INDIA.—Curious instances might be collected from the records of Indian law courts illustrative of the Old World beliefs of the people, which are brought at times into such strange collision with the legal forms of procedure established by our modern lawyers. A man was once being tried for murder, when he put forward a plea such as could only have occurred to an Oriental, and to a believer in the transmigration of souls. He did not deny having killed the man—on the contrary, he described in detail the particulars of the murder—but he stated in justification that his victim and he had been acquainted in a previous state of existence, when the now murdered man had murdered him, in proof of which he showed a great seam across his side, which had been the swordcut that had ended his previous existence. He further said that when he heard he was again to be sent into this world, he entreated his master to excuse him from coming, as he had a presentiment that he should

meet his murderer, and that harm would come of it. All this he stated in perfect earnestness and simplicity, and with evident conviction of its truth and force—a conviction shared by a large number of those in court.

Trial by jury is attended with peculiar difficulties in India, an instance of which I remember as having occurred. In that case, also, a man was on his trial for the murder of another. He had been caught red-handed, and there was no possible room for doubt in the matter. The murdered man had succumbed almost immediately to his wound, living only long enough, after being discovered, to ask for some water to drink. Some surprise was felt at the time taken by the jury in considering their verdict; but when at length they returned and recorded it, the astonishment of all in the court was unbounded when it proved to be one of not guilty. So extraordinary a verdict could not pass unchallenged, and the judge inquired by what process of reasoning they had arrived at their decision; if the accused had not murdered the man, who had? "Your lordship, we are of opinion that the injuries were not the cause of the man's death. It has been proved that he drank water shortly before his death, and we are of the opinion that it was drinking the water that killed him." The explanation of this remarkable verdict—the more remarkable when it is remembered that the men who brought it in never drank anything but water themselves—was that on the jury was a high-caste Brahmin, to whom the very idea of being a party to taking away a man's life was so abhorrent that no earthly persuasion could have induced him to agree to a verdict that would have hanged the prisoner; and the earnestness of his horror had exercised a influence over the rest of the jury so powerful as to make them return the verdict which so staggered the court.—*Notes and Queries.*

PROMISSORY NOTE—PAROL EVIDENCE AS TO INDORSEMENT—In *Kingsland* v. *Kueppe*, in the Supreme Court of Illinois (28 Northeastern Reporter, 48), the distinction between an indorsement by the payee of a note and by a stranger to it, as regards the admissibility of parol evidence to explain the actual contract, is discussed.

The Court said in part: "Where the payee of a note indorses it by placing his name on the back of the instrument, a contract of indorsement is created; the liability assumed by the payee being established by the writing. Parol evidence to change or vary the terms or conditions of a contract is not admissible (*Mason* v. *Burton*, 54 Ill., 353; *Johnson* v. *Glover*, 121 Ill., 283, 12 N.E. Rep., 257; *Jones* v. *Albee*, 70 Ill., 34; *Woodward* v. *Foster*, 18 Grat., 200). But where a person who is not the payee of a promissory note, but a third party, places his name on the back thereof, a different question arises. In such case the rule long established in this State is that it may be shown by parol evidence what liability was intended to be assumed. In an early case (*Cushman* v. *Dement*, 3 Scam., 497), where a third party wrote his name across the back of a note, it was held that the indorsement was *prima facie* evidence of a liability in the capacity of a guarantor, but the legal presumption was liable to be rebutted by parol proof. In

Boynton v. *Pierce* (79 Ill., 145), where the obligation of a guarantor arose, it was expressly held that the presumption that a party, not the payee, who places his name on the back of a note is a guarantor may be rebutted by parol evidence. In *Stowell* v. *Raymond* (83 Ill., 120), where the question again arose, the same rule was declared. The question again arose in *Eberhart* v. *Page* (89 Ill., 550), and in deciding the case it is said: 'The indorsement of a note in blank by a third party raises a presumption only that it is intended thereby to assume the liability of guarantor, which may be rebutted by proof that the real agreement between the parties was different.'

"From the cases cited it is apparent that this Court is fully committed to the doctrine that, when a third party writes his name across the back of a promissory note, the presumption from the indorsement is that he assumed the liability of guarantor; yet parol evidence may be introduced to prove what liability was in fact assumed. It is conceded in the argument of appellants that the cases cited fully establish the rule indicated; but it is insisted that these cases were virtually overruled by *Johnson* v. *Glover* (121 Ill., 283, 12 N.E. Rep., 257). This is a misapprehension of the force and effect of that decision. In that case, Johnson, who was the payee of a note, indorsed it in blank, and the note subsequently fell into the hands of Glover, who sued Johnson as a guarantor; and it was held that he was not a guarantor, but an indorser, and that parol evidence was not admissible to vary or change the character of the liability he had assumed. It is there said: 'The general rule is that the name of the payee appearing on the back of the instrument is evidence that he is indorser, and proves that he has assumed the liability of indorser as fully as if the agreement were written out in words (citing authorities). Parol evidence is no more admissible to contradict or vary this contract than any other written contract.' What was decided in this case, and what was said, had reference solely to a payee of a promissory note who had indorsed the note in blank, and had no bearing whatever upon the rights or obligations of a third party who had placed his name on the back of a note. Moreover, it is manifest that there was no intention to overrule or modify the doctrine announced in *Boynton* v. *Pierce* (79 Ill., 145), *Stowell* v. *Raymond* (83 Ill., 120), and *Eberhart* v. *Page* (89 Ill., 550)—from the ruling in *Bank* v. *Nixon* (125 Ill., 618, 18 N.E. Rep., 203). This case was heard and decided some time after *Johnson* v. *Glover* had been decided, and the doctrine of *Boynton*, *Stowell* and *Eberhardt* was approved, and those cases were cited as sustaining the rule announced. We think, therefore, that the ruling of the Circuit Court in the admission of evidence, that the defendants might resort to parol evidence to prove what contract was made between the parties, was correct. The signature of the defendants written on the back of the notes was *prima facie* evidence that the defendants assumed the liability of guarantors; but whether the evidence introduced was sufficient to remove the legal presumption of guaranty was a question of fact for the trial Court, who heard the cause without a jury, which does not arise here, and upon which we express no opinion."—*New York Law Journal.*

LIABILITIES OF DESERTED HUSBANDS.—Mr. Walter Austin's name is principally known in relation to children, but it was in connection with another branch of the "Law of Domestic Relations," as Mr. Eversley expressed it, that he appeared before the magistrate at Greenwich on Friday last. We do not propose to discuss here the details of his attempt to recover possession of a house from a lady whom he claims as his wife, while she, it appears, repudiates that character; but in these days when the mutual rights of husband and wife are more and more coming to the front, it may be useful to be possessed of clear ideas on the points on which he and Mr. Marsham, the magistrate, exchanged question and answer. Mr. Austin alleges that he is a deserted husband, his wife having left him without saying where she was going, but, having returned in three months' time, got possession of his house and barred it against him; and he desired to know whether he was bound to support a woman who went in another name and denied being his wife. Mr. Marsham informed him that he must support her if she was his wife, and if he could not prove that she had committed adultery. Mr. Austin said that he had recently offered her a home but she refused to go to it, whereupon the magistrate advised him that if she became chargeable no doubt the guardians would come upon him to pay for her support, and probably from his statement he would have to pay. If she would not live with him, the husband—or the *soi-disant* husband—inquired what was he to do? for which the magistrate replied, "Perhaps you had better let her become chargeable." On Mr. Austin, however, remarking that she had committed no end of assaults upon him, and that he was better without her, the magistrate, by sequence of ideas which is not apparent upon the surface, departed from this advice, and told him that he had better allow her sufficient to prevent her becoming chargeable: whether as a mark of gratitude for the assaults she had committed or for the kindness she had done in taking herself off was left to the imagination.

With the precise state of the actual facts between Mr. Walter Austin and the lady who may be entitled to, but does not rejoice in, the designation of Mrs. Walter Austin, we are not acquainted, nor, indeed, concerned; but it is legitimate subject for concern whether the law is as the magistrate considers it to be. Is it the fact either that a husband whose wife has voluntarily deserted him must still support her unless she has committed adultery, or that in case of her becoming chargeable to the parish the guardians can recover against him the cost of her maintenance? It is, of course, clearly settled that the wife's desertion, if coupled with adultery, relieves the husband not only from his common law liability to those who may have supplied her with necessaries, but also from his criminal liability under the Vagrant Act (*R.* v. *Flentau*, 1 B. and Ad. 227), and from his liability under the Poor Law Act of 1868, to pay towards her support (*Cullen* v. *Charman*, 7 Q.B.D. 89), but is her adultery a necessary condition of his relief from liability?

The language of Mr. Eversley in his work on the "Law of Domestic Relations," though somewhat obscure, would suggest the conclusion that it was necessary. "If," he says, "the wife leave the husband at her own instance and

through her own fault, as where she elopes from him and lives in adultery, he is not liable for debts and contracts made by her during the separation, for her adultery (to be proved at the trial) when living apart from him destroys her implied agency to pledge his credit" (p. 278). Here at first sight the words "as where she elopes from him and lives in adultery" would seem to be used merely as an illustration—the strongest case, no doubt, of such a departure by the wife as will relieve the husband, but still only one case—but the subsequent clause shows that this is not the author's meaning, for he affirms it to be the adultery, and not the desertion, which destroys her implied agency, and clearly suggests that if sued on her contracts made after she has quitted him, he will be liable unless he can substantiate the fact of her adultery. Five cases are cited for this proposition, but three of them were cases of adultery. In another, *Hardie* v. *Guest*, the tradesman who gave credit to the wife did so after notice from the husband that he charged the wife with adultery, and the remaining case, *Emmel* v. *Norton*, though in it there was no proof of adultery, is yet no authority that the deserted husband is liable, for he had by his pleading admitted liability to some extent, and merely raised a question as to the amount.

It appears to us that reason, as well as authority, are against this extended view of the husband's liability. A wife living with her husband is ostensibly his agent in contracting; a wife living apart is either trusted on the supposition that she is a *femme sole*, or else the trader has tolerably clear notice that the relations between her and her husband are not the normal relations. The presumption appears to be naturally against her being any longer his agent, and the burden of proof ought reasonably to be on the person supplying her to show that she is living apart under such circumstances as give her an implied authority to bind him. Indeed, the law is so laid down elsewhere (p. 277) by Mr. Eversley himself. Similarly, in *Johnston* v. *Sumner* (3 H. & N. 261), Chief Baron Pollock declares: "If she leaves without her husband's consent, it is clear she has no authority. She has none of the ordinary authorities of a wife, for she is not in the ordinary case of a wife, viz., living with her husband; she has no necessary authority, because she has brought her condition on herself and can return": and in *Eastland* v. *Burchell* (3 Q.B.D. 432) Mr. Justice Lush observes: "If she leaves him without cause and without consent, she carries no implied authority with her to maintain herself at his expense." Both these passages, indeed, may be said to be mere *dicta*, and not essential for a decision of the cases actually in hand. *Hindley* v. *Marquis of Westmeath* (6 B. & C. 200), however, appears to be more strictly in point; for although the parties there were living apart under a separation deed, yet as it was a void one the case was practically as if there were none; and as the husband had always been willing, and, indeed, was desirous, to have his wife back at home, it was held that she could not make him liable for her debts.

Of course, if the wife, after deserting her husband, should wish to return and he should refuse to receive her, she would no longer be living apart without his consent, and it is probable that his liability would therefore revive. It might even in the present day be not without peril for him to give so grudging a con-

sent to her return as the defendant in *Child* v. *Hardyman* (Str. 875), who said she could never sit at the upper end of his table again or have the management of his children, but should live in a garret. Such treatment was considered by Chief Justice Raymond to be as good as she deserved, and as a home was thus open to her she could not make him liable on her contracts. At the present day, however, we apprehend that such a case must be read with a *sed quære.*

If, then, subject to this condition, the erratic but not criminal spouse bears with her no authority to make her husband liable to creditors, can she make him liable to the parish? It would probably be scarcely contended that he would be subject to criminal liability as a rogue and vagabond for not maintaining her. It is true that she so far differs from an adulterous wife that the words which in *R.* v. *Flentau* are used about the latter could not be applied to her. "If," says Mr. Justice Littledale, "the husband is not obliged to answer for the wife's contracts, or to receive her into his house, it cannot be said that he is legally bound to maintain her." The chaste wife he is no doubt bound to receive into his house, and will make himself liable on her contracts if he refuses to do so; he is, therefore, to that extent "legally bound" to maintain her: it does not appear, however, that he "refuses or neglects" to do so if the necessaries of life are there for her in his house if she chooses to come and enjoy them. The practical question would be whether he is liable under the Act of 1868 to have an order made upon him to contribute to her maintenance. *Cullen* v. *Charman* establishes that there are cases in which the husband is not liable, and that the case of an adulterous wife is one of such cases, but it does not, of course, decide that it is the only case, and *Reg.* v. *Fordham* (5 Times, L.R., 27) supports the view that it is not. It was there decided that where a wife had left her husband but the husband was willing to receive her back, a maintenance order could not be properly made unless the magistrate found that there were such facts as justified the wife in declining to avail herself of the proposed shelter. That there may be such facts is, of course, perfectly plain, and *Thomas* v. *Alsop* (5 L.R.Q.B. 151) is an authority that a husband who by his ill-treatment of his wife has caused her to leave him, and whose conduct justifies her in remaining apart, cannot escape from liability to the parish for her maintenance by an offer to receive her again into his home. With such cases as this we are not here concerned; we are considering only the liability of a husband whose wife has wantonly departed from him, and we submit—*pace* Mr. Marsham—that the theory of the law does not confer on such a woman the power of subjecting her unfortunate husband, as long as he is prepared to give her a home, either to the demands of individual creditors or to the claims of the parochial authorities.—*Law Gazette.*

Reviews and Notices of Books.

Alphabetical Digest of Cases relating to Crown Lands and cognate matters. By George Kennedy, M.A., LL.D., Law Clerk to the Department of Crown Lands for Ontario. Toronto: Warwick & Sons, 1891.

A collection of the various points touched upon in the more important decisions relating to the Crown lands, under their respective heads, alphabetically arranged, and with copious cross references. A very useful compilation.

A Treatise on the Law relating to the Custody of Infants, including Practice and Forms. By Lewis Hochheimer, of the Baltimore Bar. Second edition. Baltimore: Harold B. Scrimger, 1891.

A concise statement of the law in the United States respecting the custody of infants, under all circumstances, with a comparison of the law of England, and numerous references to both English and American cases.

The Corporation Problem: The public phases of Corporations, their uses, abuses, benefits, dangers, wealth, and power; with a discussion of the social, industrial, economic, and political questions to which they have given rise. By William W. Cook, of the New York Bar, author of "A Treatise on Stock and Stockholders, etc." New York and London: G. P. Putnam's Sons, 1891.

The author discusses, in their various phases as enumerated in the title, the many social, political, industrial, and economic questions that have arisen in connection with corporations. The various controversies to which corporations have given rise, their privileges and monopolies, with their appropriate remedies, with a special reference to railroads and trusts, are successively treated in an able and masterful manner.

The Jurisprudence of the Privy Council. By J. J. Beauchamp, B.C.L., Advocate. Montreal: A. Periard, Law Publisher, 1891.

The Liquor License Act of the Province of Ontario. By His Honor J. S. Sinclair, Judge of the County Court of the County of Wentworth, etc., and Edwin Ernest Seager. Hamilton: Times Printing Company, 1891.

The two works lastly above mentioned have been received, and will be reviewed in our next number.

Correspondence.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—Would it not be better, as a rule, to appoint County Court judges from outside the local bar. It is inevitable that a lawyer in considerable practice will make many enemies in his neighborhood, and disproportionate friendships.

One chosen from an outside bar could not be charged with either bias or prejudice, and such a choice would more nearly approximate the condition of things in the superior courts. Yours,

LEX.

[We shall refer to this matter hereafter. In the meantime we should be glad to hear from some of our readers on the subject.—ED. L.J.]

To the Editor of THE CANADA LAW JOURNAL:

SIR,—I have been making a special study for the past month or so of the mining rights of the Crown in the provinces. I have been writing up some papers to show that the clause in the Quebec Mining Acts imposing a royalty on *all* minerals in the soil, heretofore granted or to be granted, is *ultra vires* of the Provincial Legislature.

Whilst investigating the matter, it occurred to me what right has the Province of Ontario to legislate concerning base metals and minerals? Why does not the common law of England prevail there in regard to them? I should be very glad if you would open up your columns to my reply, should you think favorably of it.

Yours truly,

Montreal, Sept. 2, 1891. F. S.

[The question of our correspondent is disposed of by s. 109 of the B. N. A. Act: "All lands, mines, minerals, and royalties, belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick, at the union, and all sums then due or payable for such lands, mines, minerals, or royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick, in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same." This section is very fully reviewed by the Judicial Committee of the Privy Council in *Attorney General of Ontario* v. *Mercer*, 8 App. Cas. 767, and especially the expression, "mines and minerals," on pp. 777-779.—ED. L.J.]

To the Editor of THE CANADA LAW JOURNAL:

Though I date from Ottawa, I am not going to tell of any new scandal, and no more are wanted:

> "Enough of boodlers to the law shall yield
> In the full harvest of the *Tartean* field."

In the phrase of the day, enough official heads are taken or to be taken off, and, curiously enough, there is, and has been for some time, posted at an employment bureau in the immediate neighborhood of the Parliament buildings a notice informing us that seventy-five head-choppers are wanted. It is not stated to whom candidates are to apply. As remedies for the epidemic, an article in the lay press suggests higher pay for M.P.'s, a suggestion probably founded on the absolute absence of bribery and boodling across the border, where the remedy is applied! A board of control has been mentioned, but who shall control the controllers? The Auditor-General's department has been attacked, and even the Count of the Holy Roman Empire has not escaped!

Of bills for amending the law, there are but few: the Commons so amended the Anti-Combines Act as to make it effective, but the Senate has so modified the amendment as to make the Act a chip in porridge; for would not a combine causing "detriment to the public" be a conspiracy to commit a crime and punishable without the Act?

At last, ten years after the English bill, 43 & 44 Vict., c. 9, for the like purpose, we have a bill for meeting the difficulty arising out of rapidity of travel by railroad, introduced by Mr. Tupper, the Minister of Marine. It is understood that the bill is not intended to pass in the present session, and that it is printed for the consideration of members and the public, and, therefore, it is a proper subject for you and your readers to deal with, which I hope you and they will do. The preamble refers to the international conference at Washington in 1884, which recommended the meridian of Greenwich as the prime meridian common to all nations, at which Canada was ably represented by Mr. Sandford Fleming, and to which all English-speaking peoples are indebted for its decision, and then mentions what is called the "Hour Zone System" of reckoning time as having been adopted with great advantage to the public by railway companies in America and many other countries, including Canada, and the doubts that its adoption has occasioned as to its legal effect in the latter; for though there is no doubt that the legal civil time in the Dominion is mean solar time as heretofore, and no power but the legislature could make it otherwise, many people believe the time adopted by the railway companies, and which they call standard time, has been substituted for it. The enacting clauses of the bill do not sanction this belief, or adopt the fifteen degree hour zone system, as defined in the original scheme of the railway companies in the bill introduced by Mr. Evarts in the United States Senate, and more especially in the amusing and instructive article by Mr. Fleming in the *American Engineering Magazine* for May, 1891, but makes

time-zones of provinces and territories without referring to their longitude, following in this respect the principle of the English Act. But under that Act the greatest difference between the statutory time and mean solar time would be twenty-four minutes, and in the time-zones as defined in Mr. Fleming's article, thirty minutes; while under Mr. Tupper's it would be more than two hours in Quebec and Ontario. This would, I think, be a very great inconvenience, though a difference of half an hour might, in England, be counterbalanced by certain advantages. The hour zone system has never been made legal in the United States, except in the District of Washington (ten miles square), and it appears that elsewhere the subject is one for the State legislatures. The advantage of zone time would seem to be limited to zones comprised in one country or tract under the same civil jurisdiction. Boundaries by meridians would be difficult to find and use, and the extent of Quebec and Ontario from east to west is over 30°, or two hours of time. When the question first arose, the opinion of the gentlemen of the Washington Observatory was that the best plan for America would be to have one *Railway Time* (that of 90° west) across the continent, leaving solar time for the ordinary purposes of civil life. I believe this would be the best for Canada, and that Mr. Tupper's bill (with a provision that its time clauses should apply only to contracts and agreements, oral or in writing, in which expressions of time are declared to mean and refer to *Railway Time*, but should in them be binding in law), would be unexceptionable; though it would perhaps be still better if one *Railway Time* were enacted for the whole Dominion; legal civil time for other purposes remaining, as heretofore, the mean solar time of each locality. The twenty-four hour day is very good; it is and has long been used in Italy and other countries.

Ottawa, Sept. 22, 1891. W.

DIARY FOR OCTOBER.

1. Thur.....Wm. D. Powell, 5th C.J. of Q.B., 1816. Meredith, J., Ch. Div., 1890.
4. Sun.....*19th Sunday after Trinity.*
5. Mon.....Civil Assizes at Toronto. County Ct. Sittings for Motions, except in York. Surrogate Court sits.
6. Tues.....County Ct. Non-Jury Sitgs., except in York.
7. Wed.....Henry Alcock, 3rd C.J. of Q.B., 1802.
8. Thur.....Sir W. B. Richards, C.J. Supreme Court, 1875. R. A. Harrison, 11th C.J. of Q.B., 1876.
9. Fri.....De la Barre, Governor, 1682.
11. Sun.....*20th Sunday after Trinity.* Guy Carleton, Governor, 1774.
12. Mon.....County Court Sittings for Motions in York. Surrogate Ct. Sittings. America discovered, 1492. Battle of Queenston Heights, 1812.
15. Thur....English Law introduced into Upper Canada, 1791.
18. Sun.....*21st Sunday after Trinity.* St. Luke.
19. Mon.....County Court Non-Jury Sittings in York. Last day for Call and Admission notices.
21. Wed.....Battle of Trafalgar, 1805.
23. Fri.....Lord Lansdowne, Governor-General, 1883.
24. Sat.....Sir J. H. Craig, Governor-General, 1807.
25. Sun.....*22nd Sunday after Trinity.*
27. Tues.....Supreme Court sits. C. S. Paterson, J. of Supreme Court, 1888. James Maclennan, J., Court of Appeal, 1888.
29. Thur....Battle of Fort Erie, 1813.
31. Sat.....All Hallows Eve.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

STREET, J.] [May 28.

IN RE DWYER AND TOWN OF PORT ARTHUR.

Assessment and taxes—R.S.O., c. 193, s. 52—"May," meaning of.

By s. 52 of the Assessment Act, R.S.O., c. 193, where the assessment in cities, towns, etc., is made, by virtue of a by-law passed under that section, in the latter part of the year, such assessment may be adopted by the council of the following year.

Held, that "may," as used here, is permissive only, and that the council of the following year are given the option of having a new assessment.

Overwhelmingly strong reasons of convenience in favor of having one assessment instead of two might justify the court in giving to "may" the force of "must."

Aylesworth, Q.C., and *H. Symons*, for the applicant.

Delamere, Q.C., for the corporation.

STREET, J.] [July 28.

ELLIS *v.* CLEMENS.

Waters and Watercourses—Riparian proprietors—Use of stream—Reasonable user—Prescriptive right—Maintenance of dam for twenty years—Changed conditions—Right of action.

Riparian proprietors are entitled to make a reasonable use of the water of a stream, to detain it and retard it within certain limits; but any user which inflicts positive, repeated, and sensible injury upon a proprietor, above or below, is not to be considered reasonable.

And where the defendant and his predecessor, by discontinuing the use of the water during the hard frosts, might have prevented the damage complained of by the plaintiff, but did not so discontinue, though requested to do so by the plaintiff,

Held, that they were making an unreasonable use of the water and were liable for the damage done.

The fact that the defendant and his predecessors had maintained their dam, mill, and race-way in the same position for upwards of forty years, and had, during all that time, used the water as the necessity of their business required, did not give the defendant a right to use the water to the prejudice of the plaintiff; the defendant could not insist that he had gained a prescriptive right to injure the plaintiff without proving that he and his predecessors had for twenty years been making an unreasonable use of the water, to the injury of the plaintiff; the use which had formerly been reasonable, becoming unreasonable, because of changed conditions, there arose for the first time a grievance which gave the plaintiff a right to complain, and he was not barred of that right by reason of his making no complaint until he began to be injured.

W. R. Meredith, Q.C., and *E. P. Clement* for the plaintiff.

Moss, Q.C., and *Alexander Millar*, Q.C., for he defendant.

Chancery Division.

Div'l. Court] [March 26.

BEATTY *v.* RUMBLE ET AL.

False Arrest—Malicious prosecution—R.S.C., c. 164, s. 50—Larceny—R.S.C., c. 174, s. 25—Apprehension without warrant—Finding of jury.

Plaintiff, who was acting as a bailiff under a landlord's warrant to distrain for rent, attempted to remove some grain which had been seized by a sheriff under an execution, and, while in the act, was arrested by the sheriff's officer who happened to be a county constable. He was committed for trial and tried, but acquitted.

In an action for false arrest and malicious prosecution, it was

Held, that the grain was property under lawful seizure and in the custody of the law, and that by R.S.C., c. 164, s. 50, any one taking it away without lawful authority was guilty of larceny, and that by R.S.C., c. 174, s. 25, any one found committing such an offence might be apprehended without a warrant and forthwith taken before a justice of the peace, and that the finding of the jury that the defendant acted as a sheriff's bailiff and not as a constable was immaterial, as it was incumbent on any by-stander to do as he did, and the action was dismissed with costs.

John Macgregor for the plaintiff.

Lount, Q.C., and *Milligan*, for defendants.

ROBERTSON, J.] [June 30.

MOOT *v.* GIBSON.

Covenant—Joint—Right to enforce—Receiver—Appointment of.

G., being the owner of certain property, conveyed it to B. in consideration of the assignment by B. to her three sons of certain interests he had in lands in Assiniboia, part of the bargain being that the three sons should secure to her (G.), by a mortgage on the property assigned to them, an annuity of $150 a year for her life. The arrangement was evidenced by an agreement in writing between G., her three sons, and B., in which G. and her sons all joined in a covenant with B. to give the mortgage to secure the annuity, but there was no agreement with her as a promisee that the annuity should be paid or the mortgage given.

On a motion by the judgment creditor to have a receiver appointed to receive the annuity, in which it was contended that because G. was a covenanting party with the sons there was no agreement which she could enforce against them, and consequently nothing receivable from them, it was

Held, following *Gandy* v. *Gandy*, 30 Ch.D., at p. 69, that the true construction of the agreement was to give G. a right to a mortgage as security for the payment of her annuity and to maintain an action in her own name against her three sons for the enforcement of the covenant.

Held, also, that the conveyance of her property was the consideration for the payment by the sons of the annuity as evidenced by the agreement, and that even if they did not give the mortgage to secure it as agreed she would be entitled to maintain an action to enforce payment.

And a receiver was appointed.

Collier for the plaintiff.

Marsh, Q.C., for the defendant.

MACMAHON, J.] [Aug. 15.

STOTT *v.* LANCASHIRE FIRE INSURANCE CO.

Insurance—Conditions—Material to the risk.

Action on interim receipts of the defendants.

The application, signed by the agent of the insured, contained the question :

13. Have you ever had any property destroyed or damaged by fire? If so, when and where?

The answer was, No.

This was, in fact, untrue, as the insured had suffered from fires to other properties of his ; and on the matter being referred to them, the jury found that the answer was material to the risk.

Held, that this matter was to be regarded with reference to R.S.O., 1887, c. 167, s. 114, s-s. 1 ; and that it was for the judge to say whether or not, in the light of the condition then set out, the above answer was material to the risk ; and *held*, that it was not.

D. McCarthy, Q.C., and *Wyld*, for the plaintiff.

J. K. Kerr, Q.C., and *McLean*, for the defendants.

ROBERTSON, J.] [Sept. 1.

WATERLOO ELECTION PETITION.

KNELL *v.* BOWMAN.

Controverted election—Election petition—Unqualified petitioner—Voters' list—Substituting new petition.

Held, that although the name of the petitioner in this case was on the voters' list in force, and being used at the election in question, the respondent was nevertheless entitled to show in these proceedings that the petitioner was not "a person who had a right to vote at the election to which the petition relates."

Held, nevertheless, that though the present petitioner was disqualified, it was within the jurisdiction of the court to order another elector duly qualified to be substituted as petitioner.

It is clear the intention of Parliament is that the petition, when once presented, shall be proceeded with if an elector duly qualified manifests his willingness to be substituted for the purpose of presenting the petition.

W. R. Meredith, Q.C., for the petitioner.

Aylesworth, Q.C., for the respondent.

ROBERTSON, J.] [Sept. 1.

MITCHELL *v.* LISTER.

Partnership action—Costs—Partner surreptitiously engaging in private business—Right to account.

Motion on further directions in a partnership action.

Held, that the fact that the only dispute between the partners was as to a certain item in the accounts, in which dispute the plaintiff succeeded, was not sufficient to entitle the plaintiff o his costs against the defendant.

Chapman v. *Newell*, 14 P.R. 208, followed.

It appeared that after notice of dissolution of the partnership had been given, the plaintiff took certain orders in connection with the business, and had not accounted to the defendant for his share of the profits therefrom.

The articles of partnership contained a clause that "each of the partners shall be just and true to each other in all matters of the said business, and will devote their whole time diligently and faithfully to the concerns of the same, and will not at any time during their copartnership engage in any other business whatever outside of that already existing."

Held, that, nevertheless, the defendant was not entitled to judgment for half of the estimated profits of the orders taken by the plaintiff and his travellers.

Dean v. *Macdowall*, 8 Chy.D. 345, specially referred to.

Worrell, Q.C., for the plaintiff.

Armour, Q.C., for the defendant.

Full Court.] [Sept. 5.
FERGUSON, J.]
MEREDITH, J.]

VERNON *v.* CORPORATION OF SMITH'S FALLS.

Municipal Corporation — Chief constable — Wrongful dismissal — Tenure of Office — R.S.O., c. 184, s. 445.

Action for wrongful dismissal. The plaintiff was appointed by by-law chief constable of the defendants' corporation for a period of one year.

Held, that nevertheless, by virtue of s. 445, the plaintiff must be deemed to have held his office during the pleasure of the defendants, and they had the right to dismiss him without assigning cause at any time.

Britton, Q.C., for the defendants.

Watson, Q.C., for the plaintiff.

Full Court.] [Sept. 5.

MCARTHUR *v.* DEANS.

Locatees—Right to sell pine—Patentees—R.S.O., c. 25, ss. 10, 11.

Held, that a locatee of land whose rights are governed by R.S.O., 1887, c. 25, s. 10, or a patentee whose rights are governed by *ib.*, s. 11, though he may really intend to clear a parcel of land, cannot simply point out such parcel to a purchaser before anything is done in the way of clearing it for cultivation and make a good sale to such purchaser of the pine timber standing and growing upon such parcel.

The right or liberty is only to cut and dispose of trees during the process of actually clearing the land for cultivation, when it appears to be and is requisite that the trees should for the purposes of such clearing be removed.

Per MEREDITH, J. The act seems to contemplate the work of clearing and cultivation being done by the settler.

W. Nesbitt for the plaintiff.

Aylesworth, Q.C., for the defendant.

Full Court.] [Sept. 5.
FERGUSON, J.]
ROBERTSON, J.]

MARTIN *v.* HUTCHINSON.

Action for malicious prosecution—Clandestine removal of goods by tenants—Reasonable and probable cause—11 Geo. 2, c. 19—Counsel's advice.

In an action for malicious prosecution, the jury having found upon facts in dispute, the question of reasonable and probable cause is for the judge.

Where there has been a clandestine removal of goods by a tenant, a landlord cannot prosecute for such removal under 11 Geo. 2, c. 19, unless the goods were the goods of the tenant; neither can goods which are not the tenant's be distrained off the premises.

Where a prosecutor has *bona fide* taken and acted upon the opinion of counsel in the proceedings taken by him, this is itself evidence to prove reasonable and probable cause.

Per ROBERTSON. J. The defendant should satisfy the jury that he himself did not of his own knowledge know the law on the point, and that he was relying entirely upon counsel's advice.

McCullough for the plaintiff.

Reeve, Q.C., for the defendant.

Div'l. Court.] [Sept. 5.

BAIN *v.* ÆTNA LIFE INSURANCE CO.

Insurance—Divisible surplus—Divisible profits—Discretion of directors of company to retain profits to provide for contingencies.

On an appeal to the Divisional Court, the judgment of FALCONBRIDGE, J., reported, was affirmed.

Per BOYD, C. The representation made that participating policies "would receive their equitable share of the divisible surplus" points to the exercise of the discretion of the managers of the company; and the expression "divisible surplus" is one that refers to something less than the entire profits claimed by the plaintiff. Before divisible profits can be ascertained, it would seem to be essential for the security of policy holders to keep such resources in hand as will cover the whole liabilities of the company, having regard to the uncertain chances of mortality, rate of interest, expenses etc.

Per MEREDITH, J. There is no express covenant in the policy to pay the plaintiff any profits. Divisible profits are what remains to be divided after certain deductions are made, and the bargain was to pay the plaintiff a fair and equal share of the "divisible profits"; that is, the profits which the company might, after making in good faith all reasonable and proper provision for its safety, divide among policy holders.

Bain, Q.C. (in person), and *Laidlaw*, Q.C., for the appeal.

S. H. Blake, Q.C., and *Maclaren*, Q.C., contra.

ROBERTSON, J.] [Sept. 17.

THE ACME SILVER CO. *v.* THE STACEY HARDWARE, ETC., CO.

Libel—False and malicious publication—Allegation of special damage—Demurrer.

In an action of libel, plaintiff's statement of claim alleged that the defendants falsely and maliciously published of and concerning the plaintiff's goods. . . . "We do not keep acme or common plate," and also alleged special damage,

Held, on demurrer, that as the allegation was that the defendants "falsely and maliciously" published of and concerning the plaintiffs, etc., and as special damage was alleged in direct terms (following *The Western Counties Manure Co.v. The Lawes Chemical Manure Co.*, L.R. 9 Ex. 218), if the plaintiffs were able to prove that allegation, they would be entitled to judgment and the demurrer was overruled.

John A. Robinson for the demurrer.

S. King contra.

Practice.

BOYD, C.] [Sept. 8.

SIMPSON *v.* HALL.

Writ of summons—Service out of the jurisdiction—Rule 271 (g)—Allowance of service—Joint conspiracy—Bona fides—Undertaking to prove cause of action.

Where the alleged cause of action was a joint conspiracy by the defendants, two of whom re-

sided in the jurisdiction, and a third, who was a foreigner, was implicated, service on the foreigner out of the jurisdiction of a notice in lieu of the writ of summons was

Held, properly allowed under Rule 271 (g).

Massey v. *Heynes*, 21 Q.B.D., at pp. 334, 335; and *Indigo Co.* v. *Ogilvy* (1891), 2 Ch. 13, specially referred to.

Such an order should not be made unless the judge is reasonably satisfied as to the *bona fides* of the plaintiff in joining the foreign defendant; and as an evidence of such *bona fides* the plaintiff in this action was required to undertake to submit to a non-suit if he failed to prove a joint cause of action at the trial as against the foreign defendant.

Perkins v. *Mississippi, etc., Co.*, 10 P.R. 198, not followed.

Thomas v. *Hamilton*, 17 Q.B.D., at p. 597, specially referred to.

A. McLean Macdonell for the plaintiff.

H. S. Osler for the defendant Rogers.

BOYD, C.] [Sept. 8.

HENDERSON *v.* BLAIN.

Discovery—Action by shareholders of insolvent bank against directors for misfeasance—Joining bank as parties—Examination of liquidator by plaintiff before statement of claim—Rule 566.

An official liquidator cannot, as an officer of the Court, be called upon to make discovery unless he is representatively in the position of an adverse litigant to the party requiring the discovery.

Where certain shareholders of an insolvent bank were suing the directors for negligence and misfeasance, and had made the bank defendants for conformity without asking any relief against them, an application by the plaintiffs under Rule 566 for leave to examine one of the liquidators for discovery before statement of claim was refused.

W. R. Smyth for the plaintiffs.

Hilton for the liquidators.

Shepley, Q.C., *F. E. Hodgins*, and *W. B. Raymond*, for the other defendants.

MANITOBA.

COURT OF QUEEN'S BENCH.

CASE MACHINE CO. *v.* LAIRD.

BAIN, J.] [July 27.

Parol evidence—Admissibility of, in collateral agreements.

Demurrer to plaintiffs' replication.

The facts appear from the

Judgment—

The rule that parol testimony cannot be received to add to, vary, or contradict a written instrument does not prevent parties to a written agreement, even if it be under seal, from proving that what is called a collateral agreement was made by parol in consideration that one of the parties would enter into the written agreement. The contention of the plaintiffs is that the agreement alleged in the defendant's pleas and counter-claim is not a collateral agreement, but that it contradicts and varies, and so is inconsistent with, the deed alleged in the declaration, and that, therefore, the defendant cannot rely on it unless it be by deed.

The agreement under seal that the plaintiffs declare on is, that the defendant is to pay $915 on the delivery of the machine, or, in lieu of such payment, to pay $300 on delivery and to give his three notes for $200, $200, and $215, payable with interest in January, 1891, '92, and '93 respectively, and that "failing to pay said money or execute and deliver said notes, this order shall stand as his written obligation and have the same force and effect as his note for all sums not paid in cash." The agreement alleged by the defendant is, in effect, that, in consideration that the defendant would enter into the agreement declared on and would make the cash payment and would deliver the three notes, the plaintiffs would take from the defendant a second-hand separator at the price of $200, and would give the defendant credit for the price on the note for $200 falling due in January, 1891.

I am of opinion that this agreement is one that is distinct from and collateral to the agreement under seal, and that the defendant is at liberty to prove it, if he can, though it be not under seal. Such an agreement does not seem to be in any way inconsistent with the principal

agreement; and it does not contradict or vary any of its terms. The defendant has to perform all the stipulations of his contract with the plaintiffs exactly as the contract provides; he is to make the cash payment and give the notes, and pay the notes on the days appointed. But by a separate and distinct transaction, the plaintiffs are to take this second-hand separator from the defendant, and, instead of paying him the price of it, they are to apply it toward the payment of the first of the $200 notes.

I think, therefore, the demurrer to the plaintiffs' replication should be allowed with costs.

Mulock, Q.C., for plaintiffs.

Howell, Q.C., for defendant.

MASSEY CO. *v.* HANNA.

KILLAM, J.] [July 30.

Practice—Prohibition—Grounds for—Cost of.

Plaintiffs issued writ in a county court. Defendant filed dispute note objecting to jurisdiction, and obtained rule for a prohibition. Before the filing of dispute note and the motion for rule, plaintiffs discovered their error and notified the clerk of county court not to proceed with the action, and, on being served with the rule, notified defendant that they did not intend to proceed, and undertook to withdraw and pay costs of county court action.

On the return of the rule,

Patterson, for the plaintiffs, submitted to the prohibition, but argued that under such circumstances no costs should be allowed to the applicant.

Mulock, Q.C., in reply.

Held: From the decisions in *Rex* v. *Keating*, 1 Dowl. 440; *Pewtress* v. *Harvey*, 1 B. & Ad. 154; and *Ex parte the Overseers of Everton*, L. R. 10, C. P. 245, it appears that the statute 1 W. 4, c. 21, s. 1, providing that "the party in whose favor judgment shall be given" in prohibition "shall be entitled to the costs of attending the application and subsequent proceedings" does not apply when there are no pleadings in prohibition. See also *Wallace* v. *Allen*, L. R. 6 C. P. 245, and *Nerlick* v. *Clifford*, 6 P. R. 212, in the latter of which costs were refused where the question had not been raised in the lower court.

"It is clear upon the authorities cited in *Nerlick* v. *Clifford* that there is no absolute right to prohibition where the defect does not appear on the face of the proceedings and the party applies before he has an opportunity of raising the question in the court below. If the applicant had waited until the plaintiff had learned of the objection to the jurisdiction being taken, he would have found that an application would be unnecessary.

"I think that, in the absence of special circumstances, as to which I say nothing, the old practice should be followed when no cause is shown and the application is made without giving the court below an opportunity of deciding the point. Encouragement should not be given to parties to come to this court unnecessarily in reference to small claims which the county courts are established to deal with." *Brisebois* v. *Poudrier*, 1 M. R. 29; *Wright* v. *Arnold*, 6 M. R. 1; *Watson* v. *Lillico*, 6 M. R. 29; *Montreal* v. *Poynen*, 7 M. R. 270; *Mitchell* v. *Saver*, 20 Ont. 17; and *Field* v. *Rice*, 20 Ont. 309, considered.

Rule absolute without costs.

Notes of United States Cases.

ALABAMA SUPREME COURT.

MORRIS *v.* BIRMINGHAM NATIONAL BANK.

Accommodation note—Liability of indorser.

In an action by the indorsee of a note against the administrator of a deceased indorser, it was shown that the note was made for the accommodation of the indorser and discounted for him by the indorsee.

Held, that the indorser of a note, made for his accommodation, is not discharged from liability by the failure of the holder to demand payment of the maker and to give such indorser notice of non-payment.

OHIO SUPREME COURT.

CINCINNATI, ETC., RY. CO. *v.* CITY, ETC. TELEPHONE ASSO'N.

Electric street railways—Ground circuit—Rights of telephone companies.

The dominant purpose for which streets in a municipality are dedicated and opened is to facilitate public travel and transportation, and,

in that view, new and improved modes of conveyance by street railways are by law authorized to be constructed, and a franchise granted to a telephone company of constructing and operating its lines along and upon such streets is subordinate to the rights of the public in the streets for the purpose of travel and transportation. See *Cumberland Telephone, etc., Co.* v. *United Electric Ry. Co.*, 42 Fed. Rep. 273; 42 Alb. L.J. 88.

The fact that a telephone company acquired and entered upon the exercise of a franchise to erect and maintain its telephone poles and wires upon the streets of a city prior to the operation of an electric railway thereon will not give the telephone company, in the use of the streets, a right paramount to the easement of the public to adopt and use the best and most approved mode of travel thereon; and if the operation of the street railway by electricity as the motive power tends to disturb the working of the telephone system, the remedy of the telephone company will be to readjust its methods to meet the condition created by the introduction of electro-motive power upon the street railway.

Where a telephone company, under authority derived from the statute, places its poles and wires in the streets of a municipality, and, in order to make a complete electric circuit for the transmission of telephonic messages, uses the earth, or what is known as the "ground circuit," for a return current of electricity, and where an electric street railway, afterward constructed upon the same streets, is operated with the "single trolley overhead system," so called, of which the ground circuit is a constituent part, if the use of the ground circuit in the operation of the street railway interferes with telephone communication, the telephone company, as against the street railway, will not have a vested interest and exclusive right in and to the use of the ground circuit as a part of the telephone system.

VERMONT SUPREME COURT.

GIFFORD *v.* RUTLAND SAVINGS BANK.

Savings Bank—Payment to wrong person—Liability.

1. Though the by-laws of savings banks require that depositors shall subscribe their names in a book, and thereby be considered as assenting to all the by-laws, such assent may be implied, and will be where a depositor living at a distance and receiving a deposit book by mail with the by-laws printed in it leaves the deposit and keeps the book for several years without going to the bank and leaving his signature.

2. The brother of a depositor in defendant bank, neither of whom was known to the bank officers, presented the deposit book for payment, representing himself as the owner; and, when asked how the deposit had been made, he correctly replied that it was by letter from a third person. In signing the name, he formed an initial so obscurely that it caused comment from the president. Notice of the loss of the book, required by the by-laws to be given defendant as a guard against wrong payment, and as a prerequisite for defendant's liability therefor, was not given.

Held, that defendant used reasonable care in making payment and was not liable.

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Latest additions:

Bligh (H.), and Todd (W.), Dominion Law Index, Toronto, 1891.

Canada Gazettes, 1869-1886.

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Sedgwick (Theo.), The Measure of Damages, 8th ed., 3 vols., New York, 1891.

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Flotsam and Jetsam.

ASSISTING THE JURY.—"Gentlemen of the jury," said a Minnesota judge, "murder is where a man is murderously killed. The killer in such a case is a murderer. Now, murder by poison is just as much murder as murder with a gun, pistol, or knife. It is the simple act of murdering that constitutes murder in the eye of the law. Don't let the idea of murder and manslaughter confound you. Murder is one thing, manslaughter is quite another."

The Canada Law Journal.

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THE immense sums of money, belonging to suitors in Chancery in England, which remain unclaimed can scarcely be credited. A part of the surplus interest, namely £100,000, has been applied towards the erection of the Royal Courts of Justice in London, and although, owing to an increased spirit of research, large sums have been withdrawn, the balance is still enormous. The Crown received, during the year 1890, over fifty-five thousand pounds by reason of estates reverting to it. The unclaimed dividends upon Colonial stocks amounted to one hundred and fifty thousand pounds, and the unclaimed naval prize money to two hundred and fifty-seven thousand pounds.

A recent advertisement calls for the representatives of owners of shares in the West New Jersey Society, no dividends having been paid upon the shares since the year 1692, nearly two centuries. Should descendants of those original shareholders ever be discovered, or discover themselves, their windfall will be something very large. In an action a few years since, the plaintiff, the descendant of an original stockholder in the defendant company, made out his claim to £100 of stock, which with accrued dividends since the year 1760 amounted to £3600.

A PRACTICE has recently been introduced by the Provincial Legislature of submitting diverse questions to the Court for consideration. The provision for doing so is of comparatively recent date, having been introduced by 53 Vict., c. 13, which enacts that "The Lieutenant-Governor in Council may refer to the High Court or Divisional Court thereof, or to the Court of Appeal, for hearing or consideration, any matter which he thinks fit to refer, and the Court shall thereupon hear or consider the same."

As the statute in no way limits the matters to be referred, the possibilities of the Act are unlimited; but the wisdom of the provision is doubtful. Experience teaches us that it is more expedient that points should be decided as they arise in litigation, and that judgment comes with far more weight when given in real actions. It is a well-known fact that the Court of Appeal have as much as they can do in keeping up with their ordinary and regular work, and it does appear to be extraordinary that the interests of litigants are to be placed on one side while some abstract problem is occupying the time of the Court. Besides, it is hardly the province of the judges to be giving opinions, and it is extremely doubtful whether their commissions include the work which may be referred to them under this Act.

Then what effect have the answers of the Court? They are merely the opinions of the Court upon certain questions; and though doubtless entitled to great re-

spect, it is questionable how far they would be binding upon a court or judge should the point arise again in the ordinary way.

In the recent Local Option case which was submitted, under this Act, to the Court of Appeal, the Chief Justice, in giving judgment, said:—"I cannot but regret that it should be thought proper to submit such a question to the Court. . . . It is in effect the same as asking a definition of the powers of assignees in insolvency, or of sheriffs, registrars, or of railroads or other companies chartered by the Province." Mr. Justice Osler most emphatically declined to answer the questions submitted, remarking that when they would arise in a proper way he would deal with them. We trust that the Attorney-General will note the words of the Chief Justice and the refractory action of Mr. Justice Osler, and refrain from continuing a practice which threatens to work great injustice to litigants and become an intolerable nuisance to the judiciary.

JUDGMENTS BY CONSENT.

In another column we have reported an important ruling of the Chancellor upon a point of practice relative to the jurisdiction of the Master in Chambers and also that of the various Local Masters throughout the province. It will be seen that his Lordship has determined that these officers have now unlimited power under the Consolidated Rules to pronounce judgments by consent in all cases. Hitherto we believe it has been pretty generally considered by a good many members of the profession (especially among those familiar with the traditions of the former Court of Chancery) that the right of the Master in Chambers and Local Masters to pronounce judgments was strictly limited by the Rules to the classes of cases in which that power appears to be explicitly conferred, *e.g.*, to administration and partition actions commenced by notice of motion, mortgage actions for foreclosure, sale, or redemption, where infants were concerned, and to actions on specially endorsed writs in which they were empowered not to pronounce judgment, but to order judgment to be entered for the amount indorsed, notwithstanding an appearance by the defendant.

The Master in Chambers, however, has been accustomed to make orders—but whether they have been treated or entered as judgments, we are not able to state—under the provisions of Rule 756, which enables the order to be made by "the court or a judge"—see *Taylor* v. *Cook*, 11 P.R. 60. This jurisdiction, it will be seen, the Chancellor now affirms to be rightly exercised by the Master in Chambers, and by analogy to the power conferred by that Rule, he holds the still larger power of granting judgments in all cases on consent is implicitly vested in the Master in Chambers and Local Masters.

Formerly a decree in chambers, even by consent, was never granted in the old Court of Chancery except in the cases explicitly provided for in the former Chancery orders, and it has for a long time past been customary to move in court in the Chancery Division (and, we believe, in the other Divisions also) for judgments upon consents. This branch of business will be now shifted from court

to chambers. Having regard to the provisions of the Judicature Act, s. 53, s-s. 10, whereby it is enacted that an order of the court (which would probably be held to include "a judgment") shall not, as against a purchaser, whether with or without notice, be invalidated on the ground of want of jurisdiction, or want of any "concurrence, consent, notice, or service," it is plain that the jurisdiction now declared to be vested in these officers is one that needs to be very carefully and cautiously exercised.

We believe it is too much the fashion even for the judges to bestow a very perfunctory consideration to consent matters; it seems to be too generally assumed that only the parties to the consent can be affected or prejudiced by any order made in pursuance of a consent; but under the provision we have referred to it is quite clear that the rights of a purchaser under a consent judgment may intervene so as practically to oust the rights of persons who are not parties to the consent on which the judgment is based; for it will be observed the want of any necessary consent is not to invalidate the judgment as against a purchaser even *with notice.*

Kekewich, J., we believe, very correctly estimated the importance of this branch of business when he said, "I know of nothing which requires more careful exercise of judicial power than the deciding on or granting applications when there is no real argument; the consent business of the court being, according to my experience, as a rule, even more difficult than the contentious business": *Conway* v. *Fenton*, 40 Ch.D. 518. The reason is obvious: the judge or judicial officer receives practically no assistance from the bar; both parties are merely solicitous that what they have agreed to may be sanctioned by the court. As a matter of fact, it is common experience to find parties agreeing to judgments dealing not only with matters over which they have the exclusive power and the right to consent, but also with matters in which others besides themselves are concerned, who are in no way represented in the action; *e.g.*, as regards costs payable out of a fund in which the litigant may have only an interest in common with others not before the court, the parties are always ready to agree that they shall be taxed between solicitor and client, and shall be paid in priority to all other claims, altogether regardless of the interests of other parties in the fund. These and many other peculiarities of consents to judgments will have to be carefully scrutinized or trouble will ensue, and in any case it will be strange if the courts do not before long have some knotty points to solve arising out of judgments which have been thus obtained. For we shall have not only the able and experienced officer who now holds the office of Master in Chambers pronouncing judgments in all sorts of cases, but we shall have many others who have neither his ability nor experience doing so.

For instance, suppose some judicial officer were by consent of parties to grant a judgment declaring a marriage void in an action framed as in *Lawless* v. *Chamberlain*, 18 Ont. 296, and the parties should then marry again, what would be the position of the parties on their second marriage? Would the husband and wife be guilty of bigamy, and would the issue of the second marriage be legitimate or illegitimate? Would the issue of the first marriage be bastardised? Would a

purchaser from the husband subsequent to the judgment be entitled to hold free from the dower of the first wife?

Having regard to the wide extent of the jurisdiction of the court and to the consequent extensive range of subjects which may be made the subject of litigation, and consequently of consent judgments, it may perhaps ere long need to be considered whether this unlimited power of granting judgments by consent now held to be vested in the Master in Chambers and Local Masters ought not in some way to be curtailed and limited so as to confine it to cases of mere money demands and judgments for accounts and inquiries, which, we are inclined to believe, is the utmost limit to which such a jurisdiction should be delegated to any judicial officer.

Not only in the case we have put, but in others that might be mentioned, a judge, we believe, would refuse to pronounce a judgment upon consent, as being contrary to public policy, and on no consideration would he pronounce a judgment declaring a marriage void except on the most plain and sufficient evidence of its invalidity. But we can conceive that some inexperienced local officer might assume that he was bound to grant a judgment in accordance with a consent, no matter what the subject-matter of it might be. For it must be remembered that under the Judicature Act no previous professional training whatever appears to be necessary for the Master's office. The occupant apparently need not even be a law student, and still less a barrister or solicitor.

Assuming a judgment by consent to be pronounced in a case where the court itself would not have pronounced judgment, it would nevertheless stand in the same position as if it had been pronounced by a judge; and it would certainly be a hardship to deprive innocent persons of rights which they had *bonâ fide* acquired on the faith of it.

COMMENTS ON CURRENT ENGLISH DECISIONS.

(August numbers of the Law Reports—continued.)

ARBITRATION—APPLICATION TO STAY PROCEEDINGS—"STEP IN THE PROCEEDINGS."

Chappell v. *North* (1891), 2 Q.B. 252, was an application under the Arbitration Act, 1889, to stay proceedings and to compel the reference of a counter-claim to arbitration pursuant to an agreement. The statute authorized the motion to be made "at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings." After the delivery of the counter-claim, the defendant took out a summons for directions for the purpose of obtaining discovery from the plaintiff, and on the hearing of this summons the plaintiff applied for and obtained leave to administer interrogatories to the defendant. Denman and Wills, JJ., were of opinion that the plaintiff's applying for and obtaining leave to administer interrogatories was a "step in the proceedings," and consequently there was no jurisdiction to stay the proceedings.

STATUTE, CONSTRUCTION OF—ACT, WHEN RETROSPECTIVE.

In re Williams & Stepney (1891), 2 Q.B. 257, the Court of Appeal (Lord Esher, M.R., and Lopes and Kay, L.JJ.) reversed the decision of the Divisional

Court (noted *ante* p. 357) on the ground that by s. 25 of the Act it was expressly made retrospective as regards arbitrations commenced after the Act under any agreement or order made before the commencement of the Act, and that consequently the provisions of s. 2 were retrospective, there being nothing in the Act to except them from the rest of the Act as regards its retrospective effect.

SPECIAL STATUTORY REMEDY FOR RECOVERY OF MONEY—PROCEEDINGS UNDER SPECIAL ACT, BAR TO CIVIL ACTION.

In *Vernon* v. *Watson* (1891), 2 Q.B. 288, the Court of Appeal (Lord Esher, M.R., and Fry, L.J.) affirmed the decision of Pollock, B., and Charles, J. (1891), 1 Q.B. 400 (noted *ante* p. 166). The Court was of opinion that the statute in question in effect gave the aggrieved party both a civil remedy and criminal remedy combined for the money misappropriated; that the order for payment was a remedy for the civil right which was enforcible by imprisonment; which operated not only as a punishment of the offender, but also as an execution; and which, being satisfied by the imprisonment, was a satisfaction not only of the criminal, but of the civil remedy also.

ADULTERATION—MILK IN COURSE OF DELIVERY UNDER CONTRACT OF SALE—SEPARATE INFORMATION IN RESPECT OF SAMPLES FROM SEPARATE CANS—(SEE R.S.C., C. 107, SS. 15, 22, 23; 53 VICT., C, 26, S. 9 (D.)).

Fecitt v. *Walsh* (1891), 2 Q.B. 304, was a case stated by justices. Two informations were preferred by the respondent against the appellant for an offence under The Sale of Foods and Drugs Act, 1875. It appeared that the appellant was the consignor of certain milk which was being delivered at a workhouse, the guardians of which were the purchasers. The contract provided that the milk was to contain a certain percentage of cream, and that it should be tested on delivery, and a reduction made in the price in the event of a deficiency of cream. In the course of delivery, the inspector on the same day and occasion took samples from two cans which, on analysis, were found to be largely deficient in cream; whereupon two separate informations were laid, one in respect of each sample. The appellant was convicted on both charges. Two questions were submitted to the Court (Day and Lawrance, JJ.): First, would a separate information lie in respect of each can which was found to contain milk deficient in cream? The Court held that the appellant had committed a separate offence as to each can, and therefore a separate information could be brought in respect of each can. Secondly, whether the stipulation in the contract providing for a diminution of the price in case of a deficiency of cream exonerated the appellant? and the Court held that it did not. It may be observed that the English Act, 38 & 39 Vict., c. 63, s. 9, is different in its terms from the Canadian statute, R.S.C., c. 107, s. 15. The former expressly provides that no person shall for the purpose of sale, without notice, abstract any part of an article of food so as to injure its quality, substance, or nature. The Canadian statute seems to be practically to the same effect, since it declares that milk from which any valuable constituent has been abstracted is to be deemed to be adulterated, and only authorizes the sale of skimmed milk in cans having thereon the word "skimmed," as provided in the Act.

SHIP—CHARTER PARTY—SHIPOWNER, LIABILITY OF, NOTWITHSTANDING CHARTER PARTY—PRINCIPAL AND AGENT—MASTER OF SHIP.

Baumvoll v. *Gilchrest* (1891), 2 Q.B. 310, is an interesting case on the law of principal and agent. The defendant Furness was owner of a ship which he had chartered to his co-defendant, Gilchrest. By the charter party it was provided that the captain, officers (except the engineer), and crew, should be appointed and paid by the charterer, and they were in fact so appointed and paid. The charter party reserved to the owner sufficient space for ship's officers, crew, tackle, and stores; and it was also thereby provided that the captain should be under the orders of the charterer, and that the latter should indemnify the owner from all liability arising from the captain signing bills of lading. The plaintiffs, without having any notice of the existence of a charter party, shipped on board a quantity of cotton under bills of lading, some of which were signed by the captain and the rest by a firm of Ross, Keene & Co., who acted as the charterer's agents at the port of shipment; but in the bills of lading they stated themselves to be "agents," but did not state who their principals were. The cotton was lost at sea under circumstances not excepted by the bills of lading. The question which Charles, J., was called on to decide was whether the owner was liable for the loss, and he came to the conclusion that he was, on the ground that, although he did not actually authorize the captain or agents, yet he "allowed them to appear before the world" as his agents, and was therefore liable to the plaintiffs, who contracted with the apparent agents in a matter within the apparent scope of the agency.

DEFAMATION—SLANDER—PRIVILEGED COMMUNICATION.

Stuart v. *Bell* (1891), 2 Q.B. 341, was an action for slander. The plaintiff was the valet of the celebrated explorer, H. M. Stanley, and had accompanied his master on a visit to the defendant, who was a magistrate and mayor of the town of Newcastle. The chief constable of the town showed the defendant a letter he had received from the Edinburgh police, stating that the plaintiff was suspected of stealing a watch while at an Edinburgh hotel, and suggesting that cautious inquiry should be made, so as not to injure the plaintiff, to ascertain whether the plaintiff was in possession of the property. The defendant did not make any inquiry, but just before Mr. Stanley left Newcastle he informed him privately that there had been a theft in the hotel, and that suspicion had fallen on the plaintiff. A few days afterwards the plaintiff was dismissed from his employment on the ground that he had been suspected of dishonesty. The judge at the trial directed the jury that the communication was not privileged, and they assessed the damages at £250; but on appeal the majority of the Court of Appeal (Lindley and Kay, L.JJ.) were of opinion that the occasion was privileged, and that in the absence of proof of malice the defendant was not liable. Lopes, L.J., however, dissented, and agreed with Wills, J., who tried the case. The majority of the Court base their conclusion on the ground that the communication was made in discharge of a "moral and social duty," which Lindley, L.J., defines to be "a duty recognized by English people of ordinary intelligence

and moral principle, but at the same time not a duty enforcible by legal proceedings, whether civil or criminal." But the difficulty of determining when a duty of this kind arises is sufficiently apparent from this very case, where we find out of four English people of more than "ordinary intelligence and moral principle" two holding that the defendant was discharging such a duty, while two others were agreed that he was officiously interfering and, without sufficient ground, impugning the honesty of the plaintiff, to his serious damage.

ADMINISTRATION—FOREIGN WILL OF PROPERTY ABROAD—INTESTACY AS TO ENGLISH ESTATE.

In re Mann (1891), P. 293, a testatrix had made a will expressly limited to her property abroad, and had died intestate as to her estate in England. Under these circumstances, the executors assenting, a grant of administration of the English estate was made to the next of kin.

ADMINISTRATION—GRANT TO SON, PASSING OVER HUSBAND.

In re Moore (1891), P. 299, the husband of the deceased, having been cited to accept or refuse administration, and not having appeared, a grant of administration was made to the son of the deceased, who was her sole next of kin.

CONTRACT OF SERVICE—AGREEMENT TO GIVE WHOLE TIME—INJUNCTION—SPECIFIC PERFORMANCE.

Whitwood Chemical Co. v. *Hardman* (1891), 2 Ch. 416, is an illustration of the rule that a court of equity will not attempt to enforce the specific performance of a contract for personal service. In this case the defendant had agreed to give, during a specified term, "the whole of his time to the company's business." There was no negative stipulation that he would not during that time engage in any other business or occupation. The action was brought to compel the specific performance of the agreement, and the plaintiffs claimed an injunction to restrain the defendant from setting up any business or entering into any agreement, or making any engagement with any person or company other than the plaintiffs by which the defendant would cease to devote his whole time to the plaintiffs' business, etc.; and the present decision is upon a motion for an interim injunction. Kekewich, J., was of opinion that the contract of the defendant to give his whole time was in effect an express contract not to give his time to any one else than the plaintiffs, and he granted an injunction restraining the defendant from giving less than his whole time to the plaintiffs; but the Court of Appeal (Lindley and Kay, L.JJ.) were clearly of opinion that *Montague* v. *Flockton*, 16 Eq. 189, in which an injunction had also been granted in the absence of an express negative agreement, had proceeded on an erroneous view of Lord St. Leonard's decision in the well-known case of *Lumley* v. *Wagner*, 1 D.M. & G. 604. The conclusion of the Court of Appeal was not only that there was no express negative contract, but that there was not even an implied one which could be enforced by injunction. The decision of Kekewich, J., was therefore reversed.

MISREPRESENTATION—PROSPECTUS—DECEIT—ONUS PROBANDI—NEGLIGENCE—DIRECTORS, LIABILITY OF, FOR MISREPRESENTATIONS IN PROSPECTUS—COSTS.

Angus v. *Clifford* (1891), 2 Ch. 449, is a case against directors to recover damages against them for misrepresentations in a prospectus put forth by

them. In this case the plaintiff became a purchaser of shares in a mining company on the faith of a prospectus issued by the directors, in which it was stated that the reports of certain engineers therein mentioned were "prepared for the directors." As a matter of fact, the reports had been prepared at the instance of the vendors from whom the company had purchased the mine, but there was no evidence that they were incorrect or exaggerated. Romer, J., held the defendants liable, and that they were under no obligation to prove that the reports were untrue or exaggerated, as he considered that question irrelevant: but the Court of Appeal (Lindley, Bowen, and Kay, L.JJ.) reversed his decision, holding that in the absence of proof of fraud by the defendants, or of their having made the statement in question with a reckless disregard of whether it was true or not, which would be fraud, they were not liable even though the statement were false and had been negligently made. Lindley and Kay, L.JJ., without basing their opinion on that ground, also were of opinion that, even if fraud had been proved, it was also a material fact to be proved affirmatively by the plaintiff that the reports were in fact untrue. Though the action was dismissed, the defendants were refused their costs.

In connection with this case, it may well to note that a recent Provincial Statute (54 Vict., c. 34, ss. 4-6) materially modifies the law as laid down by the House of Lords in *Peek* v. *Derry*, 14 App. Cas. 337, as to the liability of directors to damages occasioned by misrepresentation in prospectuses issued by them.

WILL—DOUBLE PORTIONS—SATISFACTION OF LEGACY.

In re Lacon, Lacon v. *Lacon* (1891), 2 Ch. 482, the doctrine regarding the ademption of legacies comes under discussion. The testator bequeathed his shares in a partnership business to his three sons equally as tenants in common. At the date of his will he had 21 shares in the business, and Ernest, one of his sons, was employed as manager of the business at a salary; the other two sons were not employed in the business. Subsequently to the making of the will, Ernest pressed for an increase of salary, and the testator thereupon arranged a new deed of partnership whereby Ernest was admitted as a partner, the testator making over to him 2 of his 21 shares, Ernest accepting the position, and relinquishing his salary as manager, but receiving instead his proportion of profits as a partner, which was greater in amount. The question then arose, on the testator's death, whether Ernest was to be considered a purchaser for value of the two shares thus transferred to him, or whether they were to be regarded as a part satisfaction of his legacy. Romer, J., decided that the gift of the two shares was in the nature of a portion, and that the presumption against double portions arose, and that therefore the legacy to Ernest had been adeemed as to two of the shares thereby bequeathed to him; but the Court of Appeal (Lindley, Bowen, and Kay, L.JJ.) inclined to the opinion that the circumstances under which the gift of the two shares had been made were such as to indicate that they were not intended as a portion, but by way of remuneration for his services as manager; but that even if they were given by way of portion, they were agreed that the presumption against double portions was rebutted by the cir-

cumstances under which the two shares were given, which showed that the testator intended Ernest to have a greater share in the business than his brothers.

COMPANY—INVALID INCORPORATION OF COMPANY—WINDING-UP.

In re National Debenture Corporation (1891), 2 Ch. 505, was an application for a winding-up order in which the point was taken that the memorandum of association had not been signed by the requisite number of persons, one of the signatories having signed twice in different names. Kekewich, J., held that the company not having been duly incorporated under the statute, he had no jurisdiction to order it to be wound up; but the Court of Appeal on the question of fact allowed further evidence to be adduced, and found that the proper number of persons had signed the memorandum of association and therefore made the order asked. We may observe that the further evidence was given orally before the Court of Appeal.

PRACTICE—ACTION TO RESTRAIN NUISANCE—TRIAL BY JURY—DISCRETION OF JUDGE.

Mangan v. *Metropolitan Electric Supply Co.* (1891), 2 Ch. 551, was an action to restrain a nuisance caused by the vibration of engines, which North, J., had directed to be tried with a jury. The Court of Appeal (Lindley, Bowen, and Fry, L.JJ.) declined to interfere with his discretion, as there was no reason shown for expecting a failure of justice from the action being tried as directed.

INJUNCTION—RESTRICTIVE COVENANT—OCCUPIER.

Mander v. *Falcke* (1891), 2 Ch. 554, is a decision of the Court of Appeal (Lindley, Bowen, and Fry, L.JJ.) holding that an injunction may properly be granted against a mere occupier of premises to restrain him from using them contrary to the terms of a restrictive covenant.

WILL—CONSTRUCTION—"CONTENTS OF DESK"—CHOSES IN ACTION—KEY OF A STRONG BOX—INTENTION OF TESTATOR.

In re Robson, Robson v. *Hamilton* (1891), 2 Ch. 559, a testator had given his desk, "with the contents thereof," to his nephew Joseph. The desk in question was found to contain money, a banker's deposit receipt, a cheque payable to the testator's order unindorsed, divers promissory notes payable on demand, and the key of a box in which securities were kept. It was admitted that the money passed to the legatee, but it was claimed that neither the choses in action passed, nor the contents of the box to which the key belonged. Chitty, J., decided that the word "contents" was sufficient to pass all the *choses in action*, including those which were negotiable only after indorsement by the executors; but he held that the key of the box did not pass to the legatee because it was accessory to the box to which it belonged, which was not given to the legatee. This latter point does not appear to have been argued by counsel so far as the report shows.

TRUSTEE—POWER TO APPOINT NEW TRUSTEE—EXERCISE OF POWER BY HEIR OF DECEASED TRUSTEE —"BARE TRUSTEE"—LAND TRANSFER ACT, 1875 (38 & 39 VICT., C. 87), S. 48—(R.S.O., C. 110, SS. 3, 5).

In re Cunningham & Frayling (1891), 2 Ch. 567, was an application under the Vendors and Purchasers Act for the purpose of obtaining the opinion of the Court as to whether the vendors were able to make title. The land in question was vested in 1836 by deed in W.D. and T.P. upon trust that they "or their assigns, or the survivor of them, or the heirs and assigns of such survivor, or other the trustees or trustee for the time being," should sell the same. The deed provided that if any of the trustees should die, it should be lawful for "the acting trustees or trustee for the time being, or the executors or administrators of the last acting trustee," to appoint new trustees. T.P., who survived W.D., died intestate in 1855, leaving T.H.P. his heir. T.H.P. died intestate in 1857, leaving T.S.H.P. his heir. T.S.H.P. died intestate in 1876 (after the coming into operation of the Land Transfer Act, 1875), leaving three daughters, A., B., and C., his co-heiresses. A., B., and C. never received the rents, nor otherwise acted in the trusts till 1890, when they executed a deed purporting to appoint the vendors new trustees, and to vest the trust estate in them. The questions Stirling, J., had to decide were: First, whether A., B., and C. were "trustees for the time being," and as such entitled to execute the power of appointing new trustees? The learned judge, on the authority of *In re Morton & Hallett*, 15 Ch. D. 143, held that they were, and that having on request executed the power of appointment they were "acting trustees." He also held that T.S.H.P. was not a "bare trustee" within s. 48 of the Land Transfer Act, 1875 (R.S.O., c. 110, s. 5), and therefore the estate did not on his death pass to his personal representative. The term "bare trustee," it may be remembered, had been differently defined by Hall, V.C., and Jessel, M.R.; the former in *Christie* v. *Ovington*, 1 Ch.D. 279, determined that a trustee who had active duties to perform was not a "bare trustee" even though he had no beneficial interest; whereas Sir Geo. Jessel in *Morgan* v. *Swansea*, 9 Ch.D. 582, intimated that a "bare trustee" meant a trustee without any beneficial interest. It will thus be seen that Stirling, J., adopted the view of Hall, V.C., in preference to that of Jessel, M.R.

COMPANY—WINDING-UP—SHARES PAYABLE BY INSTALMENTS—RIGHT OF LIQUIDATOR TO CALL FOR IMMEDIATE PAYMENT OF UNPAID SHARES.

In re Cordova Union Gold Co. (1891), 2 Ch. 580, was an application by a liquidator of a company in course of being wound up for an order authorizing him to make a call for the immediate payment of the amount remaining unpaid on the shares. The application was resisted on the ground that the shares had been taken upon an agreement with the company that the shares were to be paid up in instalments, and it was contended that the calls could only be made as the instalments became due under this agreement. But Kekewich, J., held that the agreement for payment of the shares by instalments only endured during the active life of the company, and that it was superseded by the provisions of the Winding-up Act in favor of creditors, and he therefore granted the order.

AGREEMENT—ILLEGAL CONSIDERATION—STIFLING PROSECUTION.

Jones v. *Merionethshire Building Society* (1891), 2 Ch. 587, is a decision of Williams, J. The facts of the case were that the secretary of the defendants had embezzled money of the defendants' and that they had threatened him with prosecution; that he thereupon wrote to the plaintiffs (his mother and brother) informing them of the strait he was in and entreating them to come to his aid, and that unless the claim was settled by a certain day the defendants were likely to prosecute him. The plaintiffs thereupon waited upon the defendants and paid a part of the amount embezzled in cash, and gave their promissory notes to secure the balance. Nothing was said to, nor was any agreement made by, the defendants about abstaining from prosecuting. The Court, however, found as a fact that the defendants must have known that the plaintiffs' object in settling the claim was to prevent their relative from being prosecuted. The action was brought to recover the money and promissory notes which had thus been paid and given to the defendants. Williams, J., gave judgment in favor of the plaintiffs. It may be well to observe that in transactions of this kind a party making the payment, or giving the security, to relieve his relative from a prosecution is not *in pari delicto* with the person to whom the payment is made or the security is given.

COMPANY—TRANSFER OF SHARES—CONFLICTING EQUITIES TO SHARES.

Moore v. *North-Western Bank* (1891), 2 Ch. 599, was an action to determine the right to certain shares in a joint stock company. The shares stood in the name of Bradbury, the trustee of the will of J. L. Moore. The plaintiffs were beneficially entitled under the will. Bradbury had fraudulently deposited transfers of the shares with the defendants as security for a debt due by himself to them. By the terms of the articles of association every transfer of shares was required to be approved by the directors before registration. The transfer to the bank had not been approved or registered by the company when notice of the plaintiffs' claim was received by them. Under these circumstances Romer, J., held that the plaintiffs were entitled to the shares in preference to the bank. He says at p. 602: "As between two persons claiming title to shares in a company like this, which are registered in the name of a third party, priority of title prevails, unless the claimant second in point of time can show that as between himself and the company, before the company received notice of the claim of the first claimant, he the second claimant has acquired the full *status* of a shareholder; or at any rate that all formalities have been complied with, and that nothing more than some purely ministerial act remains to be done by the company, which as between the company and the second claimant the company could not have refused to do forthwith; so that as between himself and the company he may be said to have acquired, in the words of Lord Selborne (*Societé Générale de Paris* v. *Walker*, 11 App. Cas. 20, 29), 'a present, absolute, unconditional right to have the transfer registered, before the company was informed of the existence of a better title.'"

Notes on Exchanges and Legal Scrap Book.

COMMISSIONER—SOLICITOR STRUCK OFF ROLL.—Mr. Justice Stirling holds, in *Ward* v. *Gamgee*, that where a solicitor was appointed a commissioner under 22 Vict., c. 16 (R.S.O. (1887), c. 62), and afterwards struck off the roll, he can still act under his commission.

PRESUMPTION OF DEATH.—A Scotch statute enacts that any person who has not been heard of for seven years may be assumed to be dead, and his heirs may enjoy his estate. If, however, the absentee should return within thirteen years, he may demand and receive it back.

STATUE, INJUNCTION TO RESTRAIN ERECTION.—In *Schuyler* v. *Curtis* (N.Y. Sup. Ct.) the erection of a statue of a deceased person was enjoined in a case where the deceased had always been a private citizen and not a public character. "Presumptively every person remains a private citizen until he voluntarily takes some step, such as becoming a candidate for public office, or publishing or exhibiting literary or artistic productions, which makes him a public character. A person does not surrender her status as a private citizen by merely engaging in private works of philanthropy."

ADVERTISEMENTS IN GERMAN.—An interesting decision has just been given by Chancellor McGill, of New Jersey. Recently ex-Judge Blair, as a special master, made a sale of some property. The Chancellor has refused to confirm the sale because ex-Judge Blair advertised it in a German newspaper. The legislature of New Jersey last winter passed a law making it mandatory in all judicial land sales to publish an advertisement in one German newspaper. Under this law ex-Judge Blair inserted an advertisement in one English paper and one German paper. The Chancellor decided that the law had not been complied with; that the advertisement in the German paper should have been printed in English. He quotes from 4 and 6 Geo. II., which provides that all judicial proceedings after 1733 shall be published in the English language. Prior to that date they were published in Latin. The Chancellor ordered another sale, and it will be advertised in accordance with his decision.—*N.Y. Law Journal.*

WILL WITNESSES.—Has it ever struck you that your reputation as a practising solicitor is liable to suffer from a little want of care on your part concerning the selection of witnesses to a will in the execution of which you are concerned? If you will bear with us for a short time, we think that we shall convince you that this may readily happen. You have prepared a will according to the instructions of a testator, who, not being sufficiently well to come to your office to execute it.

as you to bring the document to his house for execution. You do so. d that, though far from well, the testator's mind is perfectly clear, and that understands the contents of the will, which you read over to him, and that they carry out his wishes. You yourself, since you take no interest of any kind under the will, will be able to act as one of the attesting witnesses to the will, but, as you omitted to bring with you your clerk to perform the office of second witness, you are obliged to ask the testator if there is any suitable person who will act as such witness. It chances that there is no one on the premises excepting the domestics—the housemaid, the parlor maid, the cook, and the kitchen-maid. Of these four females you select the cook, as, from what the testator tells you, she is considerably older and generally more important than the others, and, at your request, the testator directs her attendance. The will is duly executed by the testator in your presence and that of the cook, and all three names are duly appended at the foot of the will. The testator dies shortly after the execution, and, to your astonishment, the heir-at-law of the testator, who, by the terms of the will, and, as you know, by the testator's intention, is left entirely out in the cold, disputes the validity of the will, and enters a caveat against the probate thereof. The executor is consequently obliged to take steps to have the will proved in solemn form, and, with that object in view, warns the caveat and the heir-at-law—the caveator—entering an appearance to the warning; a writ is issued against him by the executor, asking that the will be proved. Proceedings go along, and, by way of defence, the heir pleads the formal defence that the formalities of the Wills Act were not complied with when the will was executed, and that the testator did not know the contents of the will, and, with the object of finding out whether this was so or not, he will cross-examine the witnesses to the will at the trial of the action. The case comes on, and you, the solicitor whose name appears as the first witness, are put in the witness-box, and you depose clearly and satisfactorily that the will was signed in your presence and in that of the cook, and that both you and the cook signed in the presence of the testator, and that all things were done as sect. 9 of the Wills Act requires. So far so good. Next the cook is put in the witness-box, and her testimony is found to be totally at variance with yours. She admits on cross-examination that, although it is quite true that the testator signed in her presence, yet she did not sign in his presence, since he left the room immediately after signing in order to take some physic, or for some other reason, and that both you and she signed in his absence, and that when both had signed, *the testator being absent*, you, the solicitor, put the will in your bag, and, for aught she knows, the testator never again saw the will. On re-examination counsel fails to shake her testimony. She gives her evidence in the most straightforward way possible. She has no interest in doing other than speaking the truth as far as on the face of the circumstances appears; and, to your consternation and dismay, the court pronounces against the will and decrees for an intestacy. The court's judgment in setting aside the will cannot fail to do your professional reputation harm. At the least it amounts to an accusation against you of carelessness in seeing to the proper execution of a most important document. In the opinion of those who

are ready to think ill of you—and there are always plenty of this way of thinking concerning members of our much-abused profession—it amounts to an accusation that your sworn testimony was contrary to fact. The judgment gives much ground for complaint against you on the part of the persons who would have taken benefits under the will had it been properly executed, as it would have been had you not been guilty of carelessness, and the fact that these people have no remedy against you for negligence, since you were not acting as their solicitor, will add coals to the fire of their grievance against you; and you will bitterly repent that you did not secure the services of some more reliable person than a female domestic to act as witness to such an important document. It will take you a long time to forget this mishap; it will be a long time before you can forgive yourself; and very possibly, if you are a person of very scrupulous or over-scrupulous feelings, you may suffer in purse as well as in reputation, since you may consider yourself bound in conscience, though not in law, to make up out of your pocket to those who would have taken under the will, had the court decreed for it, the value of what they lost by the court decreeing against the will. But, you ask, surely such a case could not occur in practice? But why not? The cook may, in such a case, give her evidence quite honestly, for her memory may mislead her; and you must not forget that in such a case of conflicting testimony the court would not fail to array the facts, and to see that, in your own interests, and to preserve your character as a careful, painstaking solicitor, you might hesitate to give the true facts, and that no such reason for withholding them applies to the case of the cook. Again, the cook's testimony may have been intentionally false; she may have been put up to the move by those interested in setting aside the will—and persons whose expectations are defeated by the will of a deceased relative will go to extremes, will use bribes and persuasion, will be guilty of any corruption to gain their ends, to set aside the will which displaces them; and it is difficult, often impossible, to prove these things. The moral we would draw is this: Whenever you take a will to the testator's house for execution—and you will probably often have occasion to do so in the course of your practice—always take with you some person of mature years and of intelligence to act as second witness in a case where you yourself are able to be the other witness; and in a case where circumstances prevent you being an attesting witness—*e.g.*, when you are appointed an executor or trustee, and have a legacy for acting, or there is a clause in the will allowing you to charge for professional work done in the capacity of executor or trustee under the will, for here, if you attest the will, you will lose the legacy in the one case, and the benefit of the clause in the other, under sec. 15 of the Wills Act (*see Re Pooley*) —in such a case take care to have with you two reliable persons to attest the will. In short, let the witness or witnesses you procure to attest the will be persons whose testimony in support of the will, should it be contested, may be relied upon—witnesses who will be beyond the reach of a bribe, and who will depose to the true facts of the case—witnesses who will give their evidence in the witness-box in such a way that the court can have no doubt that the Wills Act requirements were duly complied with. And let us remind you, in conclu-

sion, that by carelessness in the selection of the witnesses to a will, not only are you risking your professional reputation, but you are neglecting your duties as legal adviser to your client, who relies upon your doing everything in conformity with the law and in such a way that there is no chance of his will being impeached after his death, and you are omitting that care which, as a righteous and proper-minded man, you ought to take in the interests of those who are to derive benefit under the will, the execution of which is left to your superintendence.—*Law Notes.*

Reviews and Notices of Books.

The Jurisprudence of the Privy Council. By J. J. Beauchamp, B.C.L. Montreal: A. Periard, 1891.

This is a very useful work, and should find a place in every law library throughout the Dominion. The Judicial Committee of the Privy Council is, so far as the colonies are concerned, the highest appellate court in the realm. Its decisions contain the final and authoritative statement of the jurisprudence, to which our courts have to conform. As these decisions are spread over a great number of volumes, it is somewhat surprising that no digest of them should have been made to assist the practitioner in finding a particular case or the decision on any special subject. Mr. Beauchamp's book supplies this long-felt want; and from an examination of it, we feel satisfied that it will be found of great service, not only in the study of the jurisprudence and practice of this tribunal, but also in practice for reference. In giving more than the usual head-notes, the author makes a decided improvement on the ordinary digest of cases. The work contains a digest of the subject-matters of the decisions in alphabetical order, each letter being prefaced with a summary of the headings coming under it, and comprises all the decisions of the Privy Council, omitting only the ecclesiastical cases and those of a purely local or private nature. With the decisions are given the dates of the various judgments, with a reference to the full report, and the names of the courts appealed from. A feature of the work which will be of special value to the student is the careful selection made in the extracts from the leading judgments containing the principles governing the cases and the pith of the decision. By way of illustration, under the head of Bank and Banking, we find the subhead of Transfer of Shares, with a reference to the case of *Bank of Montreal* v. *Sweeny*, 56 L.J. P.C. 79, cited in an important case reported in the current number of our own Court of Appeal. The head-note contains a succinct statement of the principles of the case and a full extract from the judgment of Lord Chancellor Halsbury. We note, however, one or two typographical errors in the head-note of this case. The introduction contains a valuable sketch of the history of the Privy Council and of the creation of the Judicial Committee. How few of our readers could without research give the date of the Act constituting the Judicial Committee as a Court of Appeal, or of the amendments which have been made to that Act, viz., 3 & 4 Wm. IV., c. 41, passed for the "better

disposal of appeals and other matters in litigation referred or submitted to His Majesty in His Privy Council." The introduction also contains a summary of the procedure in appeal to the Committee, comprising the rules of practice published by their Lordships with a schedule of fees allowed solicitors in conducting appeals or other business before the Committee. The work closes with three appendices. The first contains the names of all the British colonies, with the nature and origin of their laws. This appendix will be valuable in practice in showing the difference in the jurisprudence of the various colonies, and enabling the practitioner to decide how far the decisions in one colony can be applied to cases arising in another. The second comprises notes of all the decisions of the Court of Queen's Bench (appeal side) in the Province of Quebec rendered under the articles of the Code of Civil Procedure in appeal to the Privy Council. The third appendix is a double alphabetical index of the cases reported in the volume under the names of the respective plaintiff and defendants. We can recommend this work as containing a useful digest of the jurisprudence of the Judicial Committee and valuable in understanding its present constitution and history. We congratulate the publisher on the mechanical part of the work, although we have noticed several typographical errors; these, however, are perhaps not more numerous than is usually the case in a volume of the size of the present work.

The New Empire: Reflections upon its Origin and Constitution, and its Relation to the Great Republic. By O. A. Howland. Toronto: Hart & Company. 1891.

This volume is alike creditable to the author and to the publishers. It is well written and well printed—a good specimen at once of artistic skill in authorship and of mechanical skill in book-making. It would be too much to say that there are no defects. The learned author displays, here and there, too strong a tendency to make use of untranslated quotations from foreign languages and of highly technical legal terms. Should his work reach a second edition—and we hope it will see many—he might usefully do a little translation and a little explanation or substitution. The book is, in fact and in form, a highly popular treatise on some of the greatest political problems to which the Canadian people can turn their attention, and the more readily the people can understand the argument the better the author's purpose will be served.

The line of Mr. Howland's reasoning is not difficult to explain; and though he disclaims originality, it is in fact highly original. He takes ground that, viewed as a whole, no other publicist has ever taken. His position is that the old British Empire "fell" in 1783, when by the second treaty of Paris the independence of the British colonies in America was recognized, and he writes with perfectly judicial calmness of its downfall. That event may have left some room for regret that the great colonial experiment was terminated in a costly and bloody war, which has left its traces in the feelings of the descendants of the colonists to this day, but has left room also for satisfaction that human freedom has been immensely the gainer by the sacrifice. The treaty of 1783 he regards as a "treaty of partition,"

maintaining with praiseworthy ingenuity that it was so regarded by Lord Shelburne on behalf of Britain, as well as by Franklin and his associates on behalf of the United States. There seems to be little room to question the historical correctness of this view. There can be no doubt that had the British Ministry chosen to stand out in a stubborn mood the United States would have accepted far less favorable terms rather than continue or renew the war. It would be paying but a poor compliment to Lord Shelburne's intelligence to suppose for a moment that the Americans humbugged him in the matter of either the boundaries or the fisheries. It is much more creditable to him, as well as more reasonable every way, to adopt Mr. Howland's view that Shelburne deliberately carried through a policy of liberal endowment of the independent colonies with a view to securing perpetual peace between them and the mother country.

It is not, of course, necessary to follow Mr. Howland in his justification of Shelburne's liberality. Statesmanlike and humane it was, no doubt; but it was his business as Prime Minister to get the best terms of peace he could get, and leave the future relations of the two countries to the chapter of events. Assuming from the standpoint of 1783 that it was a good thing to establish two separate English-speaking nationalities in North America, it would surely have been better and wiser to insist on the retention of the Ohio as the southern boundary of what remained British. That boundary had been fixed by Parliament in 1774. The whole country north of the Ohio was an almost unbroken wilderness. No one of the revolted colonies had any tenable claim to it, and as a matter of fact they all subsequently surrendered it to the United States because they could not agree about their title to the land. Had the boundary fixed by the Quebec Act been retained, British America would have included the States of Ohio, Illinois, Indiana, Michigan, Wisconsin, and a large part of Minnesota. True, between this great region and the Atlantic would have come in Pennsylvania, New York, and New England; but if it had at any later period seemed to both nations expedient to fix a more convenient boundary, the means of arriving at a compromise would have been available. For giving up part of the Ohio Valley Britain might have secured part of New England, and there would have been a good basis established for a North American States system. One is tempted to wonder why, on Shelburne's reasoning, he stopped short of giving up all British America, and from Mr. Howland's point of view it is not easy to find an answer to the question.

To say this is virtually to imply that the arguments in this part of the book make for the absorption of the rest of North America into the United States, but this would not correctly represent Mr. Howland's attitude as it appears to himself. He is a strong and skilful exponent of the idea of a British Empire of which the "greater half of the American continent" shall continue to form an important part. He does not pose as one of the Imperial Federationists in the ordinary sense of that term, for he believes that we have virtual federation now, and he shrinks from changing this virtual for a more formal federal tie. In this he may be right; at least his arguments are well worthy of the attention of those who differ from him. Every reader will heartily endorse his plea for a suitable celebration of the centennial of Upper Canada next year, as all will join heartily

in his aspiration that in one way or another the *prestige* of the grand old Empire may be enhanced rather than diminished. It has survived the loss of the United States. It would survive the loss of Canada, but the loss of Canada would be a serious blow to British Imperialism.

Correspondence.

SCHEDULES TO ACTS OF PARLIAMENT.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—The following correspondence respecting the proper use, drafting and treatment of schedules to Acts of Parliament and Congress—embracing, as it does, the opinions of the highest authorities in America and England—ought to be read with the greatest interest. True it is that the "frightful example" of improper drafting commented upon was Bill 96 of the present session of the Dominion Parliament entitled, "An Act respecting the Ottawa and Parry Sound Railway Company"; but we have in Ontario the same vicious system perpetuated, as in 46 Vict., c. 39 (1882-3), entitled, "An Act to legalize, confirm and declare valid certain by-laws of the corporation of the village of Renfrew." It is to be hoped that the Minister of Justice of Canada and the Attorney-General of Ontario will issue such orders as will compel for the future a closer following of the Westminster and Washington methods in the drafting of bills and the editing of acts introduced into and passed by their respective legislatures.

Letters were written by me to Anson G. McCook, Secretary of Senate, Washington, U.S.; Edward McMahon, Clerk of the House of Representatives, Washington, U.S.; Joseph H. Warner, Counsel to Chairman of Committees, House of Peers, London, England; and Hon. Edward C. Leigh, Q.C., Counsel to Speaker, House of Commons, London, England, as follows:—

"May I be permitted to ask you a question in connection with the duties of my own office which your experience in work of a similar character will enable you to answer without difficulty to yourself and with satisfaction to me.

"During my twenty years service in the Law Department of the House of Commons of Canada, it has been the custom to treat the schedules of private bills as matter apart from the body of the act. In other words, the agreements between railway companies, for example, are inserted in the statutes without correction and with all their imperfections; and although these agreements are in most cases divided into numbered paragraphs, no marginal notes are inserted by us indicating the subject-matter of these paragraphs.

"I have long endeavored to make a reform in this matter. The other day an aggravated case came before me in which there was little or nothing in the body of the bill but a reference to the schedule, in which was set out the full constitution of the company seeking incorporation; a bill very similar in the respect I

mention to the bill herewith enclosed. I wrote out marginal notes for the schedule, but the head of the office said that I might save myself the trouble, for 'we never do it.' I replied that if the custom now indulged in was a bad one it ought to be changed, and that I would endeavor to have the change effected before the next session.

"Will you kindly inform me what is the rule in this respect in your office? Do you give marginal notes to schedules which contain something more than forms? You have no doubt remarked the observation of Henry Hardcastle in his treatise on statutory law (1879), page 105: 'The schedule is an integral part of an act. To some acts of Parliament schedules are attached.' With respect to calling this part of the act a schedule, Brett, L.J., said: 'A schedule in an act is a mere question of drafting, a mere question of words. The schedule is as much a part of the statute and is as much an enactment as any other part.'

"Sir Henry Thring, Parliamentary Counsel, in his work on Practical Legislation (1877), page 40, writes as follows: 'As to schedules, great care should be taken in the preparation of schedules. It is desirable to include, in a schedule matters of detail; it is improper to put in a schedule matters of principle. The drawing the proper line of demarcation between the two classes of matter is often very difficult. All that can be said is that nothing should be placed in a schedule to which the attention of Parliament should be particularly directed; for example, the constitution of an electoral or financial body of persons should be found in the body of the act; but the mode of conducting the election of the electoral body, and the rules as to the proceedings at meetings of the financial body, may not improperly be placed in a schedule.'

"In the interests of Canadian legislation, and to settle a point which is of some moment to the work in which we are engaged, I would respectfully ask your consideration of the foregoing and your valuable opinion thereon."

R. J. WICKSTEED.

Ottawa, October, 1891.

The following answers were received:—

From Edward McMahon, Clerk of the House of Representatives, Washington:

It is not customary in our practice to affix marginal notes to bills, private or public, while in legislative progress. After passage and approval, it is the custom of the State Department, in preparing the laws for publication, to affix such notes. Nothing in our practice would therefore aid in deciding the question to which you refer.

From Anson G. McCook, Clerk of the U.S. Senate, Washington:

The practice here appears to be so different from that which you describe that I can give you no information in regard to the matter you write about. So far as I have any knowledge, there are no schedules to our bills similar to the specimen which you send. After a bill receives the approval of the President, it is sent to the office of the Secretary of State, and it is there edited, printed and published under his direction. That includes, of course, the marginal notes, which you will see in the bills, copies of which I have sent you under my frank. This office has nothing whatever to do with them after their enrolment.

From George Francis Dawson, Editor of the Laws, Department of State. Washington:

In response to your communication addressed to the Chief Clerk of this Department, and by him referred to me, I beg to state that I know of no Congressional proceedings touching the incorporation into legislative acts of schedules of agreements between railroad companies analogous to those you mention as occurring in Canadian legislation. Congressional legislation on railroad questions comes under public and not private enactment with us, and does not embrace such schedules. In general legislation on other subjects, it has been my rule to give marginal notes to schedules of agreement which contain something more than forms. For instance, in the Statutes of the Second Session, 51st Congress, chapter 165, is "An Act to ratify and confirm agreements with the Sac and Fox Nation of Indians, and the Iowa tribe of Indians, of Oklahoma Territory, and to make appropriations for carrying out the same." The articles of agreement occur in the preamble to this act, and are fully annotated in the margin because they comprehend various important matters touching the tribal and individual rights, etc., of the Indians, which by the succeeding ratification, etc., become a part of the law itself, and because such annotation adds to convenience for reference. On the other hand, where an agreement is simply one of form, as in the statutes of the first session, 51st Congress, chapter 804, which is "An Act to ratify and confirm an agreement entered into by commissioners on the part of the States of New York and Pennsylvania in relation to the boundary line between the said states," no marginal notes occur, save the word "preamble," until the enacting clause is reached. From this illustrated statement you can, I think, get a clear idea of the rule prevailing in this office, and of the reasons upon which it is founded.

From Joseph H. Warner, Counsel to Chairman of Committees, House of Lords, London, England:

I will answer your questions with pleasure. Whenever Parliament confirms a provisional order, deed, agreement, or other document, the practice here is, as a general rule, to make any necessary amendments in the document as schedules, and to confirm the document "as set out" in the schedule. This is made more easy by Standing Order 104 of the House of Lords, which is as follows: "Any agreement intended to be scheduled to any bill shall contain a clause declaring the same to be made subject to such alterations as Parliament may think fit to make therein; but if the committee on the bill make any material alteration in any such agreement, it shall be competent to any party thereto to withdraw the same." The Order applies in terms to agreements only, but the principle is extended to other documents which are "confirmed by" and therefore derive validity from the act. As regards marginal notes to schedules, we insert them only when they are in the original document. A provisional order, as scheduled to a confirming act, has marginal notes, if the order, as made by the Government Department, has such notes, but not otherwise. If the original document has no marginal notes, we do not add them. There are remarkable instances in public legislation of schedules actually forming part of the act, but printed (wrongly perhaps) without marginal notes; see, for instance, schedules one and two of the Public Health Act, 1875. It is difficult to express an opinion as to the particular case you send me of the schedule to the Ottawa and Parry Sound Railway Company's Bill. We should not put marginal notes to such a deed, but we should decline altogether to schedule it. We should require a considerable part, probably the whole of it except the lists of names and assets, to be inserted as clauses in the act itself, and these clauses would, of course, have marginal notes. I will add that the *dicta* which you cite of Mr. Hardcastle and Brett, L.J., must not be understood as meaning that every schedule is part of the act. A schedule may, by proper words, be made part of the act, but in other cases it may be binding on particular parties only, or it may be inserted merely for information, as when an act contains a clause saving the rights of certain parties under a certain document, and the document is scheduled to show what is saved. Mr. Chandos Leigh, to whom you have also written, concurs in the views which I have expressed.

DIARY FOR OCTOBER.

1. Thur.....Wm. D. Powell, 5th C.J. of Q.B., 1816. Meredith, J., Ch. Div., 1890.
4. Sun.....*19th Sunday after Trinity.*
5. Mon.....Civil Assizes at Toronto. County Ct. Sittings for Motions, except in York. Surrogate Court sits.
6. Tues.....County Ct. Non-Jury Sitgs., except in York.
7. Wed.....Henry Alcock, 3rd C.J. of Q.B., 1802.
8. Thur.....Sir W. B. Richards, C.J. Supreme Court, 1875. R. A. Harrison, 11th C.J. of Q.B., 1875.
9. Fri.....De la Barre, Governor, 1682.
11. Sun.....*20th Sunday after Trinity.* Guy Carleton, Governor, 1774.
12. Mon.....County Court Sittings for Motions in York. Surrogate Ct. Sittings. America discovered, 1492. Battle of Queenston Heights, 1812.
15. Thur....English Law introduced into Upper Canada, 1791.
18. Sun.....*21st Sunday after Trinity.* St. Luke.
19. Mon.....County Court Non-Jury Sittings in York. Last day for Call notice.
21. Wed.....Battle of Trafalgar, 1805.
23. Fri.....Lord Lansdowne, Governor-General, 1883.
24. Sat.....Sir J. H. Craig, Governor-General, 1807.
25. Sun.....*22nd Sunday after Trinity.*
27. Tues.....Supreme Court sits. C. S. Paterson, J. of Supreme Court, 1888. James Maclennan, J., Court of Appeal, 1888.
29. Thur....Battle of Fort Erie, 1813.
31. Sat.....All Hallows Eve.

Reports.

ONTARIO.

CHANCERY DIVISION.

THE LADIES' TAILORING ASSOCIATION *v.* CLARKSON.

(Reported for THE CANADA LAW JOURNAL.)

Practice—Consent judgment—Master in Chambers, jurisdiction of.

The Master in Chambers has jurisdiction to pronounce judgment by consent in any case.

[BOYD, C., Oct. 10.

W. R. Smyth, for plaintiff, obtained on consent an order from the Master in Chambers directing judgment to be entered declaring that the plaintiffs are entitled to rank upon the estate of the Colonial Umbrella Manufacturing Co., in the hands of the defendant as assignee thereof for the benefit of creditors, for $222.96 and interest, and to be paid their proportionate part as such creditors of the said estate and for payment of the same in due course of administration of the said estate; and also for payment by defendant to the plaintiffs of their disbursements and half their solicitors' fees; and also for payment to the defendant's solicitors of their fees, both sums to be charged by the defendant against the estate on passing his accounts.

On the order being brought to the Registrar of the Chancery Division, that officer doubted whether he was justified in entering judgment upon the order, and before doing so he brought the matter to the attention of the Chancellor.

BOYD, C., expressed himself as averse to putting parties to the expense of a motion in court where they were agreed as to the judgment to be pronounced. All former practice is abolished by the Con. Rules, and the practice now to be followed is to be regulated as far as possible by analogy to those Rules. Under Rule 756 he thought the Master in Chambers had jurisdiction to pronounce judgment upon any admissions of fact in the pleadings; and in the present case if the parties had put their consent on the pleadings, the Master in Chambers would clearly have had jurisdiction to pronounce the judgment under Rule 576. The parties ought not to be put to this circumlocutory procedure. In any case, therefore, where all parties are *sui juris*, there seems no good reason why a judgment by consent should not be pronounced by the Master in Chambers, and the analogy furnished by Rule 756 favors that view. It will be, of course, necessary for the officers exercising the jurisdiction in chambers to be careful to see that no improper clauses are inserted in such judgments. In the present case the direction to the defendant to pay his own costs and charge them against the estate does not seem to be proper unless the defendant represents all the creditors of the estate, which is not apparent from the order.

As to the form of the order, the Chancellor was of opinion that it should not be in the shape of an order to enter judgment, but that the judgment should be drawn up in chambers and should be entered, not as an order in chambers, but as a judgment by the proper officer, and should be based on a written consent duly signed and filed.

Early Notes of Canadian Cases.

SUPREME COURT OF CANADA.

Ontario.] [June 22.

MCRAE *v.* MARSHALL.

Master and servant—Agreement for service—Arbitrary right of dismissal—Exercise of—Forfeiture of property.

By an agreement under seal between M., the inventor of a certain machine, and McR., pro-

prietor of patents therefor, M. agreed to obtain patents for improvements on said machine and assign the same to McR., who, in consideration thereof, agreed to employ M. for two years, to place the patents on the market, paying him a certain sum for salary and expenses, and giving him a percentage on the profits made by the sales. M. agreed to devote his whole time to the business, the employer having the right, if it was not successful, to cancel the agreement at any time after the expiration of six months from its date by paying M. his salary and share of profits, if any, to date of cancellation.

By one clause of the agreement the employer was to be the absolute judge of the manner in which the employee performed his duties, and was given the right to dismiss the employed at any time for incapacity or breach of duty, the latter in such case to have his salary up to the date of dismissal, but to have no claim whatever against his employer.

M. was summarily dismissed within three months from the date of the agreement for alleged incapacity and disobedience to orders.

Held, reversing the judgment of the Court of Appeal and of the Divisional Court, that the agreement gave the employer the right at any time to dismiss M. for incapacity or breach of duty without notice, such right being absolute and not required to be exercised judicially, but only in good faith.

Held, per RITCHIE, C.J., FOURNIER, TASCHEREAU, and PATTERSON, JJ., that such right of dismissal did not deprive M. of his claim for a share of the profits of the business.

Per STRONG and GWYNNE, JJ., that the share of M. in the profits was only a part of his remuneration for his services, which he lost by being dismissed equally as he did his fixed salary.

Appeal allowed with costs.

Dalton McCarthy, Q.C., for appellant.

Quebec.] [June 22.

ROSS *v.* HANNAN.

Sale of goods by weight—Contract, when perfect—Art. 1474 C.C.—Damage to goods before weighing—Possession retained by vendor—Effect of—Arts. 1063, 1064—1802 C.C.—Depositary.

Held, (1) per RITCHIE, C.J., STRONG, FOURNIER, and PATTERSON, JJ., affirming the judgment of the court below, that where goods and merchandise are sold by weight the contract of sale is not perfect and the property of the goods remains in the vendor, and they are not at his risk until they are weighed, or until the buyer is in default to have them weighed; and this is so even where the buyer has made an examination of the goods and rejected such as were not to his satisfaction.

Held, also, per RITCHIE, C.J., FOURNIER, and TASCHEREAU, JJ., that where goods are sold by weight and the property remains in the possession of the vendor, the vendor becomes in law a depositary; and if the goods while in his possession are damaged through his default and negligence, he cannot bring an action for their value.

Appeal dismissed with costs.

Abbott, Q.C., and *Campbell*, for appellant.

Doherty, Q.C., for respondent.

THE EXCHANGE BANK *v.* FLETCHER.

Bank stock given to another bank as collateral security—Banking Act—42 Vict., c. 22, s. 8—Arts. 1970, 1973, 1975, C.C.

The Exchange Bank, in advancing money to F. on the security of Merchants Bank shares, caused the shares to be assigned to their managing director and an entry to be made in their books that the managing director held the shares in question on behalf of the bank as security for the loan. The bank subsequently credited F. with the dividends accruing thereon. Later on, the managing director pledged these shares to another bank and absconded.

Held, affirming the judgment of the court below, that upon repayment by F. of the loan made to him, the Exchange Bank was bound to return the shares or pay their value.

Appeal dismissed with costs.

Macmaster, Q.C., for appellants.

Archambault and *Lacoste*, Q.C., for respondent.

NORDHEIMER *v.* ALEXANDER.

Fire—Fall of wall after fire—Negligence—Damages.

Held, affirming the judgments of the courts below, that the owner of a wall of a house who allows it to remain standing after a fire in a dangerous condition, and takes no precautions to prevent an accident, is liable for the damage

caused by the falling of the wall, even if the falling takes place seven days after the fire during a high wind.

Appeal dismissed with costs.

Laflamme, Q.C., *Cameron*, Q.C., and *Butler*, Q.C., for appellant.

Duhamel, Q.C., and *Marceau*, for respondent.

SCHWERSENSKI *v.* VINEBERG.

Action for account of money paid—Receipt—Error—Parol evidence—Art. 1234—Art. 14 C.C.—Findings of fact—Duty of appellate court.

S. brought an action to compel V. to render an account of the sum of $2,500 which S. alleged had been paid on the 6th October, 1885, to be applied to S.'s first promissory notes maturing, and in acknowledgment of which V.'s bookkeeper gave the following receipt: "Montreal, October 6th, 1885. Received from Mr. D.S. the sum of two thousand five hundred dollars, to be applied to his first notes maturing. M. V., Fred."; and which V. failed and neglected to apply. V. pleaded that he never got the $2,500, and that the receipt was given in error and by mistake by his clerk. After documentary and parol evidence had been given, the Superior Court, whose judgment was affirmed by the Court of Queen's Bench, dismissed S.'s action.

On appeal, the Supreme Court of Canada

Held, 1. that the finding of the two courts on the question of fact as to whether the receipt had been given through error should not be interfered with.

2. That the prohibition of art. 1234 C.C. against the admission of parol evidence to contradict or vary a written instrument is not *d'ordre public;* and that if such evidence is admitted without objection at the trial, it cannot subsequently be set aside in a court of appeal.

3. That parol evidence in commercial matters is admissible against a written document to prove error. *Ætna Ins. Co.* v. *Brodie*, 5 Can. S.C.R. 1, followed.

Appeal dismissed with costs.

Cooke for appellant.

Hutchison for respondent.

Nova Scotia.] [May 12.

MERCHANTS BANK OF HALIFAX *v.* WHIDDEN.

Bank—Agent of—Excess of authority—Dealing with funds contrary to instructions—Liability to bank—Discounting for his own accommodation—Position of parties on accommodation paper.

K., agent of a bank and also a member of a business firm, procured accommodation drafts from a customer of the bank, which he discounted as such agent, and without indorsing the drafts used the proceeds, in violation of his instructions from the head office, in the business of his firm. The firm, having become insolvent, executed an assignment in trust of all their property, by which the trustee was to pay "all debts by the assignors or either of them due and owing or accruing or becoming due and owing" to the said bank as first preferred creditor, and to the makers of the accommodation paper, among others, as second preferred creditors. The estate not proving sufficient to pay the bank in full, a dispute arose as to the accommodation drafts, the bank claiming the right to disavow the action of the agent in discounting them and appropriating the proceeds in breach of his duty; the makers claiming that they were really debts due to the bank from the insolvents. In a suit to enforce the carrying out of the trusts created by the assignment,

Held, affirming the judgment of the court below, GWYNNE, J., dissenting, that the drafts were "debts due and owing" from the insolvents to the bank and within the first preference created by the deed.

Per RITCHIE, C.J.: K. procured the accommodation paper for the sole purpose of borrowing the money of the bank for his firm, and when the firm received that money they became debtors to the bank for the amount.

Per STRONG and PATTERSON, JJ., that the agent being bound to account to the bank for the funds placed at his disposal became a debtor to the bank, on his authority being revoked, for the amount of these drafts as money for which he failed to account. The right the bank had to elect to treat the act of the agent as a tort was not important, as in any case there was a debt due.

Per GWYNNE, J.: The evidence does not establish that these drafts were anything else

than paper discounted in the ordinary course of banking business, as to which the bank had its recourse against all persons whose names appeared on the face of the paper, and were not obliged to look to any other for payment.

Appeal dismissed with costs.

Henry, Q.C., and *Ross*, Q.C., for appellant.

W. Cassels, Q.C., and *W. B. Ritchie*, for respondent.

MUNICIPALITY OF CAPE BRETON *v.* MCKAY.

Municipal corporation—Appointment of board of health—R.S.N.S., 4th ser., c. 29—37 Vict., c. 6, s. 1 (N.S.)—42 Vict., c. 1, s. 6 (N.S.)—Employment of physician—Reasonable expenses—Construction of contract—Attendance upon small-pox patients for the season—Dismissal—Form of remedy—Mandamus.

S. 67 of the Act by which municipal corporations were established in Nova Scotia (42 Vict., c. 1), giving them "the appointment of health officers . . and a board of health" with the powers and authorities formerly vested in courts of sessions, does not repeal c. 29 of R.S.N.S., 4th ser., providing for the appointment of boards of health by the Lieutenant-Governor in Council. RITCHIE, C.J., *dubitante* as to appointment by the executive in incorporated counties.

A board of health appointed by the executive council, by resolution, employed M., a physician, to attend upon small-pox patients in the district "for the season," at a fixed rate of remuneration per day. Complaint having been made of the manner in which M.'s duties were performed, he was notified that another medical man had been employed as a consulting physician, but refusing to consult with him he was dismissed from his employment. He brought an action against the municipality setting forth in his statement of claim the facts of his engagement and dismissal, and claiming payment for his services up to the date at which the last small-pox patient was cured, and special damages for loss of reputation by the dismissal. The Act allows the board of health to incur reasonable expenses, which are defined to be services performed and bestowed and medicine supplied by physicians in carrying out its provisions, and makes such expenses a district, city, or county rate, to be assessed by the justices and levied as ordinary county rates.

Held, 1. Per FOURNIER, TASCHEREAU, and GWYNNE, JJ., that the employment of M. "for the season" meant for the period in which there should be small-pox patients requiring his professional services.

2. Per FOURNIER, TASCHEREAU, GWYNNE, and PATTERSON, JJ., that notwithstanding no provision was made for supplying the municipality with funds in advance to meet the reasonable expenses that might be incurred under the Act, a claim for such expenses could be enforced against a municipality by action.

3. Per RITCHIE, C.J., and STRONG, J., that the only mode of enforcing such a claim is by a writ of mandamus to oblige the municipality to levy an assessment.

4. Per FOURNIER, TASCHEREAU, and GWYNNE, JJ., affirming the judgment of the court below, that M. was entitled to payment at the rate fixed by the resolution of the board up to the time in which there ceased to be any small-pox patients to attend.

5. Per RITCHIE, C.J., STRONG and PATTERSON, JJ., that the claim of M. was really one for damages for wrongful dismissal, which is not within the provision in the act for reasonable expenses.

Appeal dismissed without costs.

W. B. Ritchie for appellant.

Henry, Q.C., for respondent.

New Brunswick.] [May 12.

LAMB *v.* CLEVELAND.

Statute—Repeal of—Restoration of former law—Distribution of intestate estate—Feme coverte—Husband's right to residuum—Next of kin.

The Legislature of New Brunswick, by 26 Geo. 3, c. 11, ss. 14 and 17, re-enacted the Imperial Act, 22 and 23 Car. 2, c. 10 (Statute of Distribution), as explained by s. 25 of 29 Car. 2, c. 3 (Statute of Frauds), which provided that nothing in the former Act should be construed to extend to estates of *femes covertes* dying intestate, but that their husbands should enjoy their personal estates as heretofore.

When the Statutes of New Brunswick were revised in 1854, the Act 26 Geo. 3, c. 11, was re-enacted, but s. 17, corresponding to s. 25 of the Statute of Frauds, was omitted. In the administration of the estate of a *feme coverte* her next of kin claimed the personalty on the ground that the husband's rights were swept away by this omission.

Held, per RITCHIE, C.J., FOURNIER and PATTERSON, JJ., that the right of a husband to the personal property of his deceased wife does not depend upon the Statute of Distributions, but he takes it *jure mariti*.

Per STRONG, J., that the repeal by the Revised Statutes of Geo. 3, c. 11, which was passed in the affirmance of the Imperial Acts, operated to restore s. 25 of the Statute of Frauds as part of the common law.

Per GWYNNE, J.: When a colonial legislature re-enacts an Imperial Act it enacts it as interpreted by the Imperial courts, and *a fortiori* by other Imperial Acts. Hence, when the English Statute of Distributions was re-enacted by 26 Geo. 3, c. 11 (N.B.), it was not necessary to enact the interpreting section of the Statute of Frauds, and its omission in the Revised Statutes did not affect the construction to be put upon the whole Act.

Held, per RITCHIE, C.J., FOURNIER, GWYNNE, and PATTERSON, JJ., that the Married Woman's Property Act of New Brunswick (C.S.N.B., c. 72), which exempts the separate property of a married woman from liability for her husband's debts and prohibits any dealing with it without her consent, only suspends the husband's rights in the property during coverture, and on the death of the wife he takes the personal property as he would if the Act had never been passed.

The Supreme Court of New Brunswick, while deciding against the next of kin on his claim to the residue of a *feme coverte*, directed that his costs should be paid out of the estate. On appeal, the decree was varied by striking out such direction.

Appeal dismissed with costs.

W. W. Wells for appellant.

Skinner, Q.C., for respondent.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

BARBER *v.* CLARK.

Mistake—Will—Legacy—Interest.

This was an appeal by the defendant, John R. Barber, from the judgment of the Chancery Division, reported 20 O.R. 522, and came on to be heard before this court—HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A.—on the 28th of September, 1891.

J. H. Macdonald, Q.C., for the appellant.

G. H. Kilmer for the respondent.

At the conclusion of the argument, the court dismissed the appeal with costs, agreeing with the reasons for judgment in the court below.

ABRAHAM *v.* ABRAHAM.

Alimony—Judgment—Registration—Priorities—Assignments and preferences—R.S.O. (1887), c. 44, s. 30—R.S.O. (1887), c. 124, s. 9.

This was an appeal from the judgment of MACMAHON, J., reported 19 O.R. 256, by one John Iddington, a creditor of the defendant, in the name of John Hossie, assignee for the benefit of the creditors of the defendant, pursuant to an order made under the provisions of the Assignments Act. The appeal came on to be heard before this court (HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A.) on the 15th September, 1891.

Moss, Q.C., for the appellant.

J. P. Mabee for the respondent.

At the conclusion of the argument, the court dismissed the appeal with costs, agreeing with and adopting the reasons for judgment given in the court below.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

FALCONBRIDGE, J.] [Sept. 2.

IN RE DAVIS AND THE CITY OF TORONTO.

Municipal corporations—By-law—Construction of sewer—Acquiring easement over adjoining lands—R.S.O., c. 184, s. 479, s-s. 15—"Using," meaning of—Quashing by-law—Acting upon by-law—Estoppel—Notice to appoint arbitrator—Costs.

A by-law of a municipal corporation authorizing the construction of a sewer provided, *inter alia*, that for the purpose of the construction the corporation might enter upon and use and occupy with horses, etc., the lands lying within twenty-five feet on either side of the centre line of the sewer; also, that after construction the

corporation might enter upon a strip of land having a width of eight feet on each side of the centre line of the sewer, for the purpose of altering, repairing, etc., the sewer; also, that owners of land through which the sewer was to be constructed might fill up the land over the sewer, or within eight feet on each side of the centre line, and might build thereon provided they did not injure or endanger the sewer, but that no person might put up, repair, alter, or maintain any building thereon without submitting plans to the city engineer and obtaining his approval in writing; also, that the construction of the sewer should not be commenced unless and until the "aforesaid easement" should have been acquired by and vested in the corporation by conveyance from the owners, at a price to be agreed upon, or, in case of disagreement, to be determined by arbitration; and also provided for a penalty and for removal of buildings in case of a breach of the by-law.

Held, that however liberally the court ought to construe a statute in favor of the public right of eminent domain, yet where there is such a complete interference with the right of property as under this by-law, there must be express words authorizing that interference, and the statute of apparent authorization must be strictly construed; and

Held, that such interference was not authorized by s. 479, s-s. 15, of the Municipal Act, R.S.O., c. 184; the word "using" employed therein meaning "holding" or "occupying," when read with the rest of the section.

The sewer in question was part of a system, but the upper end, and not an outlet for any part already constructed.

Held, that, no money having been spent under the by-law, it had not been so acted upon as to prevent its being quashed.

The applicants for an order quashing the by-law before moving had appeared on a notice to name an arbitrator before a judge, who raised the objection to the by-law above referred to, whereupon the applicants gave notice of abandonment.

Held, that the applicants were not estopped, but that they should have no costs.

James Pearson for the applicants.

Biggar, Q.C., for the corporation.

GALT, C.J.] [Sept. 17.

IN RE CRIBBIN AND THE CITY OF TORONTO.

Municipal corporations—By-law prohibiting Sunday preaching in parks—Validity of—R.S.O., c. 184, s. 504, s-s. 10—Violation of constitutional right—Unreasonableness—Uncertainty—"Sabbath-day."

It is provided by R.S.O., c. 184, s. 504, s-s. 10, that the council of every city and town may pass by-laws for the management of the farm, park, garden, etc.

Held, that the municipal council of a city had power under this enactment to pass a by-law providing that no person shall on the Sabbath-day in any public park, square, garden, etc., in the city, publicly preach, lecture, or declaim.

Held, also, that the by-law violated no constitutional right, and was not unreasonable.

Bailey v. *Williamson*, L.R. 8 Q.B. 118, followed.

Held, also, that the by-law was not bad for uncertainty as to the day of the week intended by reason of the use of the term "Sabbath-day."

G. B. Gordon for the applicant.

H. M. Mowat for the corporation.

Chancery Division.

BOYD, C.] [Sept. 5.

LASBY ET AL. *v.* CREWSON ET AL.

Will—Devise—Tenant for life—Tenants in common—Improvements—How made—Allowance for.

A husband devised his farm to his wife for life with remainder to his children in certain proportions. During the life of the widow, one of the sons, under an agreement with her, worked the farm, supplying her and her unmarried daughter with a home. The farm house becoming uninhabitable, he built a new one, paying for it himself, with the exception of a small sum received from his mother. On her death he claimed to be allowed by his co-devisees for the house as an improvement by a joint tenant.

Held, on an appeal from a master, that if improvements are made before the tenancy in common begins in part, *e.g.*, during a prior life tenancy, the equitable doctrines attaching to improvements made during tenancies in com-

mon do not arise, and that the improvements in this case were not made by the respondent in the character of a tenant in common, but as the agent of his mother, the life tenant, and could not be allowed for.

Hoyles, Q.C., for the adult appellants.

Aytoun-Finlay for the infant appellants.

Bigelow, Q.C., *contra.*

Full Court.]
FERGUSON, J.] [Sept. 5.
ROBERTSON, J.]

TAILLIFER *v.* TAILLIFER.

Private international law—Ante-nuptial contract—Matrimonial domicile—Lex rei sitæ.

Action for administration of estate of Alexis Taillifer.

The deceased, on March 31st, 1864, entered into an ante-nuptial contract in the Province of Quebec with his future wife, the present plaintiff, concerning the rights and property of the parties to it, present and future.

Held, that the provisions of this contract should govern not only as to the movable, but also as to the immovable property of the deceased, though situate in this province, provided that the laws of this province relating to real property were complied with ; and it made no difference whether the matrimonial domicile of the parties at the time of the contract and marriage was in Ontario or in Quebec.

The ante-nuptial contract in question was signed by notaries who signed their own names, having full authority from both the contracting parties so to do.

Held, that this was a sufficient signature within the Statute of Frauds to bind the parties.

Shepley, Q.C., for the plaintiff.

Aytoun-Finlay for the infant defendants.

Snow for the adult defendant.

BOYD, C.] [Sept. 17.

ROGERS *v.* ONTARIO BANK.

Fixtures—Mortgagor and Mortgagee—Fi. fa. goods—Interpleader.

Interpleader issue as to certain machinery and buildings erected by the purchaser of an equity of redemption in certain lands upon the said lands.

The machinery in question was placed *in situ* on the land and housed with a view to the utilization of it at a phosphate mine ; and it was intended to utilize the machinery upon the land so long as veins could be found. The soil was excavated in order to form a firm bed for the boiler and hoist, and the machinery was firmly attached by bolts to sleepers or skids placed on the rock bottom of the excavation ; and a house was erected over the machinery, to erect which the soil was also to some extent excavated. The boiler and machinery were also fastened to the building by rods inside underneath the floor.

Held, that the chattels in question were fixtures, and could not be removed without the consent of the mortgagee.

Semble, that, apart from this, it was impossible to sell these fixtures under an execution against goods so long as the physical attachment to the land existed, even if the owner of the equity of redemption had had the right to detach and remove them as chattels.

ROBERTSON, J.] [Sept. 17.

IN RE OWEN SOUND DRY DOCK, SHIPBUILDING, AND NAVIGATION CO. (LIMITED).

and

In the matter of the Winding-up Act, c. 126, R.S.C., 1886, and the Amending Act, 52 Vict., c. 32, Can.

Winding-up Act—Contributories—Solvency of company accepting a reduced amount in payment of stock—Right to do so.

A dry dock company, having issued stock to the extent of $15000 and having assets to over $30000 above their other liabilities, passed a by-law accepting from each of the shareholders $3000 as payment in full of $3750 stock. Subsequently the company got into difficulties and was put into liquidation under the Winding-up Act.

On an application by the liquidators to have these shareholders placed upon the list of contributories to the extent of $750 each, it was

Held, on an appeal from a master, that as the company was not only solvent at the time, but had a surplus of sufficient dimensions to warrant them in so doing, they had the right to accept $3000 in payment of $3750 stock, and the appeal was dismissed.

J. M. Kilbourn for the appeal.

Hoyles, Q.C., and *H. B. Smith*, *contra.*

Practice.

BOYD, C.] [Sept. 30.

FLETT *v.* WAY.

Costs—Scale of—Title to land—Set-off of costs—Solicitor's lien—Discretion of taxing officer—Rules 3, 1204, 1205.

Where, in an action by a monthly tenant against his landlord and other persons for wrongful entry upon the demised premises, the landlord denied the plaintiff's tenancy,

Held, that the title to land was brought in question and the costs of the plaintiff were properly taxed on the High Court scale, although the damages recovered were only $104.

Worman v. *Brady*, 12 P. R. 613, and *Danaher* v. *Little*, 13 P. R. 361, followed.

Tomkins v. *Jones*, 22 Q.B.D. 599, specially referred to.

By the judgment in the action, costs were awarded to the plaintiff against the chief defendant and to the other defendants against the plaintiff without any direction as to setting off costs, and the plaintiff's solicitor asserted a lien upon the costs awarded to his client against the chief defendant. The defendants all defended by the same solicitor.

Held, that under Rule 1204 the question of setting off costs was in the judicial discretion of the taxing officer, and that discretion was rightly exercised by the officer in refusing to set-off the costs ordered to be paid to the plaintiff by the chief defendant against the costs ordered to be paid by the plaintiff to the other defendants.

Construction of Rules 1204 and 1205.

The older decisions as to set-off are not applicable since Rule 3.

F. E. Titus for the plaintiff.

J. M. Clark for the defendants.

Flotsam and Jetsam.

COUNSEL: "What is the plaintiff's attitude as to this question?"

Witness: "Recumbent, lies about it constantly."—*Ex.*

THE jury brought in a verdict of "Not Guilty." The judge said admonishingly to the prisoner: "After this you ought to keep away from bad company." "Yes, your honor; you will not see me here again in a hurry."—*Ex.*

Law Society of Upper Canada.

LEGAL EDUCATION COMMITTEE.

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THE LAW SCHOOL.

Principal, W. A. REEVE, M.A., Q.C.

Lecturers: E. D. ARMOUR, Q.C.; A. H. MARSH, B.A., LL.B., Q.C.; R. E. KINGSFORD, M.A., LL.B.; P. H. DRAYTON.

Examiners: FRANK J. JOSEPH, LL.B.; A. W. AYTOUN-FINLAY, B.A.; M. G. CAMERON.

ATTENDANCE AT THE LAW SCHOOL.

This School was established on its present basis by the Law Society of Upper Canada in 1889, under the provisions of rules passed by the Society in the exercise of its statutory powers. It is conducted under the immediate supervision of the Legal Education Committee of the Society, subject to the control of the Benchers of the Society in Convocation assembled.

Its purpose is to secure as far as possible the possession of a thorough legal education by all those who enter upon the practice of the legal profession in the Province. To this end, with certain exceptions in the cases of students who had begun their studies prior to its establishment, attendance at the School, in some cases during two, and in others during three terms or sessions, is made compulsory upon all who desire to be admitted to the practice of the Law.

The course in the school is a three years' course. The term or session commences on the fourth Monday in September, and ends on the first Monday in May, with a vacation commencing on the Saturday before Christmas and ending on the Saturday after New Year's day.

Admission to the Law Society is ordinarily a condition precedent to attendance at the Law School. Every Student-at-Law and Articled Clerk before being allowed to enter the School must present to the Principal a certificate of the

Secretary of the Law Society, showing that he has been duly admitted upon the books of the Society, and that he has paid the prescribed fee for the term.

Students, however, residing elsewhere, and desirous of attending the lectures of the School, but not of qualifying themselves to practise in Ontario, are allowed, upon payment of the usual fee, to attend the lectures without admission to the Law Society.

The students and clerks who are exempt from attendance at the Law School are the following:

1. All students and clerks attending in a Barrister's chambers, or serving under articles elsewhere than in Toronto, and who were admitted prior to Hilary Term, 1889, so long as they continue so to attend or serve elsewhere than in Toronto.

2. All graduates who on June 25th, 1889, had entered upon the second year of their course as Students-at-Law or Articled Clerks.

3. All non-graduates who at that date had entered upon the fourth year of their course as Students-at-Law or Articled Clerks.

Provision is made by Rules 164 *(g)* and 164 *(h)* for *election* to take the School course, by students and clerks who are exempt therefrom, either in whole or in part.

Attendance at the School for one or more terms, as provided by Rules 155 to 166 inclusive, is compulsory on all students and clerks not exempt as above.

A student or clerk who is required to attend the School during one term only must attend during that term which ends in the last year of his period of attendance in a Barrister's chambers or service under articles, and may present himself for his final examination at the close of such term, although his period of attendance in chambers or service under articles may not have expired. In like manner, those who are required to attend during two terms must attend during those terms which end in the last two years respectively of their period of attendance in chambers or service, as the case may be.

Those students and clerks, not being graduates, who are required to attend the first year's lectures in the School, may do so at their own option, either in the first, second, or third year of their attendance in chambers or service under articles, upon notice to the Principal.

By a rule passed in October, 1891, students and clerks who have already been allowed their examination of the second year in the Law School, or their second intermediate examination, and under existing rules are required to attend the lectures of the third year of the Law School course during the school term of 1892-93, may elect to attend during the term of 1891-92 the lectures on such of the subjects of said third year as they may name in a written election to be delivered to the principal, provided the number of such lectures shall, in the opinion of the principal, reasonably approximate one-half of the whole number of lectures pertaining to the said third year, and may complete their attendance on lectures by attending in the remaining subjects during the term of 1892-3, presenting themselves for examination in all the subjects at the close of the last-mentioned term, and paying but one fee for both terms, such fee being payable before commencing attendance.

The course during each term embraces lectures, recitations, discussions, and other oral methods of instruction, and the holding of moot courts under the supervision of the Principal and Lecturers.

Friday of each week is devoted exclusively to moot courts, one for the second year students and another for the third year students. The first year students are required to attend, and may be allowed to take part in, one or other of these moot courts. They are presided over by the Principal or the Lecturer whose series of lectures is in progress at the time, and who states the case to be argued, and appoints two students on each side to argue it, of which notice is given at least one week before the day for argument. His decision is pronounced at the next moot court, if not given at the close of the argument.

At each lecture and moot court the roll is called, and the attendance of students carefully noted, and a record thereof kept.

At the close of each term the Principal certifies to the Legal Education Committee the names of those students who appear by the record to have duly attended the lectures of that term. No student is to be certified as having duly attended the lectures unless he has attended at least five-sixths of the aggregate number of lectures, and at least four-fifths of the number of lectures of each series, delivered during the term and pertaining to his year. If any student who has failed to attend the required

number of lectures satisfies the Principal that such failure has been due to illness or other good cause, the Principal makes a special report upon the matter to the Legal Education Committee. The word "lectures" in this connection includes moot courts.

Two lectures (one hour) daily in each year of the course are delivered on Monday, Tuesday, Wednesday, and Thursday. The moot courts take the place of lectures on Friday. Printed schedules showing the days and hours of all the lectures in the different subjects will be distributed among the students at the commencement of the term.

During his attendance in the School, the student is recommended and encouraged to devote the time not occupied in attendance upon lectures, recitations, discussions, or moot courts, in the reading and study of the books and subjects prescribed for or dealt with in the course upon which he is in attendance. As far as practicable, students will be provided with room and the use of books for this purpose.

The fee for attendance for each term of the course is $25, payable in advance to the Sub-Treasurer, who is also the Secretary of the Law Society.

The Rules which should be read for information in regard to attendance at the Law School are Rules 154 to 167 both inclusive.

Examinations.

Every applicant for admission to the Law Society, if not a graduate, must have passed an examination according to the curriculum prescribed by the Society, under the designation of "The Matriculation Curriculum." This examination is not held by the Society. The applicant must have passed some duly authorized examination, and have been enrolled as a matriculant of some University in Ontario, before he can be admitted to the Law Society.

The three law examinations which every student and clerk must pass after his admission, viz., first intermediate, second intermediate, and final examinations, must, except in the case to be presently mentioned of those students and clerks who are wholly or partly exempt from attendance at the School, be passed at the Law School Examinations under the Law School Curriculum hereinafter printed, the first intermediate examination being passed at the close of the first, the second intermediate examination at the close of the second, and the final examination at the close of the third year of the school course respectively.

Any student or clerk who under the Rules is exempt from attending the School in any one or more of the three years of the school course is at liberty, at his option, to pass the corresponding examination or examinations under the Law Society Curriculum instead of doing so at the Law School Examinations under the Law School Curriculum, provided he does so within the period during which it is deemed proper to continue the holding of examinations under the said Law Society Curriculum as heretofore. It has already been decided that the first intermediate examination under that curriculum shall not be continued after January, 1892, and after that time therefore all students and clerks must pass their first intermediate examination at the examinations and under the curriculum of the Law School, whether they are required to attend the lectures of the first year of the course or not. Due notice will be hereafter published of the discontinuance of the second intermediate and final examinations under the Law Society Curriculum.

The percentage of marks which must be obtained in order to pass an examination of the Law School is fifty-five per cent. of the aggregate number of marks obtainable, and twenty-nine per cent. of the marks obtainable upon each paper.

Examinations are also held in the week commencing with the first Monday in September for those who were not entitled to present themselves for the earlier examination, or who, having presented themselves, failed in whole or in part.

Students whose attendance upon lectures has been allowed as sufficient, and who have failed at the May examinations, may present themselves at the September examinations, either in all the subjects or in those subjects only in which they failed to obtain fifty-five per cent. of the marks obtainable in such subjects. Those entitled, and desiring, to present themselves at the September examinations must give notice in writing to the Secretary of the Law Society, at least two weeks prior to the time of such examinations, of their intention to present themselves, stating whether they intend to do so in all the subjects, or in those only in which they failed to obtain fifty-five per cent. of the marks

obtainable, mentioning the names of such subjects.

The time for holding the examinations at the close of the term of the Law School in any year may be varied from time to time by the Legal Education Committee, as occasion may require.

On the subject of examinations reference may be made to Rules 168 to 174 inclusive, and to the Act R.S.O. (1887), cap. 147, secs. 7 to 10 inclusive.

HONORS, SCHOLARSHIPS, AND MEDALS.

The Law School examinations at the close of the term include examinations for Honors in all the three years of the School course. Scholarships are offered for competition in connection with the first and second intermediate examinations, and medals in connection with the final examination.

In connection with the intermediate examinations under the Law Society's Curriculum, no examination for Honors is held, nor Scholarship offered. An examination for Honors is held, and medals are offered in connection with the final examination for Call to the Bar, but not in connection with the final examination for admission as Solicitor.

In order to be entitled to present themselves for an examination for Honors, candidates must obtain at least three-fourths of the whole number of marks obtainable on the papers, and one-third of the marks obtainable on the paper on each subject, at the Pass examination. In order to be passed with Honors, candidates must obtain at least three-fourths of the aggregate marks obtainable on the papers in both the Pass and Honor examinations, and at least one-half of the aggregate marks obtainable on the papers in each subject on both examinations.

The scholarships offered at the Law School examinations are the following :

Of the candidates passed with Honors at each of the intermediate examinations the first shall be entitled to a scholarship of $100, the second to a scholarship of $60, and the next five to a scholarship of $40 each, and each scholar shall receive a diploma certifying to the fact.

The medals offered at the final examinations of the Law School and also at the final examination for Call to the Bar under the Law Society Curriculum are the following :

Of the persons called with Honors the first three shall be entitled to medals on the following conditions :

The First: If he has passed both intermediate examinations with Honors, to a gold medal, otherwise to a silver medal.

The Second: If he has passed both intermediate examinations with Honors, to a silver medal, otherwise to a bronze medal.

The Third: If he has passed both intermediate examinations with Honors, to a bronze medal.

The diploma of each medallist shall certify to his being such medallist.

The latest edition of the Curriculum contains all the Rules of the Law Society which are of importance to students, together with the necessary forms, as well as the Statutes respecting Barristers and Solicitors, the Matriculation Curriculum, and all other necessary information. Students can obtain copies on application to the Secretary of the Law Society or the Principal of the Law School.

THE LAW SCHOOL CURRICULUM.

FIRST YEAR.

Contracts.

Smith on Contracts.
Anson on Contracts.

Real Property.

Williams on Real Property, Leith's edition.
Deane's Principles of Conveyancing.

Common Law.

Broom's Common Law.
Kerr's Student's Blackstone, Books 1 and 3.

Equity.

Snell's Principles of Equity.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

SECOND YEAR.

Criminal Law.

Kerr's Student's Blackstone, Book 4.
Harris's Principles of Criminal Law.

Real Property.

Kerr's Student's Blackstone, Book 2.
Leith & Smith's Blackstone.

Personal Property.

Williams on Personal Property.

Contracts.

Leake on Contracts.

Torts.

Bigelow on Torts—English Edition.

Equity.

H. A. Smith's Principles of Equity.

Evidence.

Powell on Evidence.

Canadian Constitutional History and Law.

Bourinot's Manual of the Constitutional History of Canada.

O'Sullivan's Government in Canada.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts..

Statute Law.

Such Acts and parts of Acts relating to the above subjects as shall be prescribed by the Principal.

THIRD YEAR.

Contracts.

Leake on Contracts.

Real Property.

Clerke & Humphrey on Sales of Land.

Hawkins on Wills.

Armour on Titles.

Criminal Law.

Harris's Principles of Criminal Law.

Criminal Statutes of Canada.

Equity.

Underhill on Trusts.

Kelleher on Specific Performance.

De Colyar on Guarantees.

Torts.

Pollock on Torts.

Smith on Negligence, 2nd ed.

Evidence.

Best on Evidence.

Commercial Law.

Benjamin on Sales.

Smith's Mercantile Law.

Chalmers on Bills.

Private International Law.

Westlake's Private International Law.

Construction and Operation of Statutes.

Hardcastle's construction and effect of Statutory Law.

Canadian Constitutional Law.

British North America Act and cases thereunder.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

THE LAW SOCIETY CURRICULUM.

Examiners: FRANK J. JOSEPH, LL.B. / A. W. AYTOUN-FINLAY, B.A. / M. G. CAMERON.

Books and Subjects prescribed for Examinations of Students and Clerks wholly or partly exempt from attendance at the Law School.

FIRST INTERMEDIATE.*

Williams on Real Property, Leith's edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and Cap. 123, Revised Statutes of Ontario, 1887, and amending Acts.

SECOND INTERMEDIATE.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages, and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada, 2nd edition; the Ontario Judicature Act; R.S.O., 1887, cap. 44; the Rules of Practice, 1888, and Revised Statutes of Ontario, chaps. 100, 110, 143.

FOR CERTIFICATE OF FITNESS.

Armour on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

FOR CALL.

Blackstone, Vol. I., containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris's Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, and Statute Law, and Pleadings and Practice of the Courts.

Candidates for the Final Examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

*The First Intermediate Examination under this Curriculum will be discontinued after January, 1892.

The Canada Law Journal.

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THE Supreme Court of the United States has before it this term some very important cases for argument; among them are the jurisdiction of the United States in the Behring Sea outside the three-mile limit; the constitutionality of the recent anti-lottery legislation, and the right of a state to tax the gross receipts of express companies. While the results may not affect us, the reasons urged *pro* and *con* cannot fail to be of interest as touching matters very near home. We called attention, *ante* p. 322, to the heavy docket to be disposed of in our neighbors' Supreme Court, and we observe now that there are nearly four hundred cases on the list. The newly organized Courts of Appeal have not as yet lightened the labor of the highest tribunal.

As we go to press the news comes that the Supreme Court has declared the Manitoba Public Schools Act, 1890, *ultra vires*, reversing the decision of the Court of Queen's Bench, reported *ante* 120. It will be remembered that the question came up on a summons on behalf of one Barrett to quash certain municipal by-laws of the city of Winnipeg, the applicant contending that the Act was *ultra vires*. Killam, J., dismissed the summons, and an appeal was taken to the Court of Queen's Bench (Taylor, C.J., Dubuc, J., and Bain, J.). The appeal was dismissed, Dubuc, J., dissenting. An appeal was then taken to the Supreme Court, with the result above stated. The Dominion Government has already stood between the appellant and his costs, and will no doubt continue to do so, for the Manitoba Government will, of course, go to the Privy Council, where the fight will be continued.

IN England, as in Ontario, the clergy are exempt from jury service, and some interest naturally was caused by the appearance recently, according to the *Law Gazette*, of two of the cloth on the grand jury at Bodmin, Cornwall. The sight seemed to have been new to the Cornish bar, as well as to the laity of both professions. We are always glad to see clergy taking advantage of their rights as citizens and assuming the duties pertaining to citizenship, and we have in our own city ministers and churches who insist on paying taxes, to say nothing of those clergymen who invariably exercise their franchise when election time comes round; but we are not accustomed in this country to seeing them in the jury-box, and we are surprised almost that they should wish to be members of that antiquated relic of the middle ages, a grand jury.

WE are requested to announce that a large and representative Committee of Benchers has been appointed to consider and report upon the subject of uncertificated conveyancers; this committee met a short time since, and Messrs. H. H. Strathy, Q.C., Barrie, and G. H. Watson, Q.C., Toronto, were appointed Chairman and Vice-Chairman respectively.

It is the intention of the committee to report to Convocation this month, and any suggestions that may be made in the meantime by members of the profession will be gladly received and considered. It will be necessary that such suggestions be sent to the chairman or vice-chairman not later than the tenth day of November, so that the same may be brought before the committee when its report upon this subject is being prepared. A perusal of the pages of this journal for many years past will, we think, give almost all that can be said on the subject, but it will be of material assistance to the committee to have the considered views of many members of the profession on the subject, and such communications are particularly requested.

IN the recent case of *Re Davis, Evans* v. *Moore*, 65 L.T. N.S. 128, we find that the English Court of Appeal (Lindley, Fry, and Lopes, L.JJ.) have come to a different conclusion to that arrived at by the Ontario Court of Appeal in *Cameron* v. *Campbell*, 7 Ont. App. 361. In the latter case, which was a suit against executors to recover a legacy, it may be remembered that the executors pleaded the Statute of Limitations, but the Court of Appeal agreed with Blake, V.C., in holding that as the money had been set apart to answer the trusts of the will, it thereby became impressed with a trust in the hands of the executors, and therefore the statute afforded no defence. The English Court of Appeal, on the other hand, though also admitting in a similar state of facts that a trust arises in respect of a legacy, yet holds that it is not an express trust, and therefore the statute may be set up as a defence to its recovery. The reasoning of the court is summed up in these words, which we extract from the judgment of Lindley, L.J.: "The Statute of Limitations excepts one class of trusts and one only, viz., express trusts, and this order [*i.e.*, an order made in an administration action which declared the executor entitled to a certain fund as representative of the testatrix's estate] no more declares an express trust than does the will. An implied trust will not do, for a legacy does not cease to be a legacy because it is coupled with some implied trust. In one sense an executor is always a trustee. But the Statute of Limitations cannot be got rid of by calling the executor a trustee, or by proving him to be a trustee. The only way of getting out of the Statute of Limitations is by proving an express trust." The English Court of Appeal holds that neither the assent of the executor to a legacy, nor the fact that an implied trust has arisen in regard to it, will prevent an executor setting up the statute.

UNITED STATES LEGISLATION.

At the annual meeting of the American Bar Association held at Boston, the President delivered the usual interesting opening address, in which he referred to the more important changes in the statute law of the Union and its various constituent States. So onerous does he find the task of a comprehensive and faithful research into the various "statutory" flights of the different States that he is driven to remark that no president of the Association can regret that he is ineligible for a second term; for, he says, the task involves "a review of a large part, perhaps the best part, of the history of the world since last we met, for where is history more truly written than in the legislation of the times, and what new field of legislation is entered upon in this age, in any quarter of the globe, that is not soon known and travelled in every other?"

He contrasts the requirements of the various States and territories, of which there are now forty-four of the former and six of the latter, "fifty distinct and for most purposes independent governments, each with a legislature expected and desirous to add something of value to the institutions of its people." "Something" each legislature undoubtedly does add, but not always of lasting "value."

The association has, by continued pressure brought to bear upon Congress, succeeded in having the salaries of the federal judiciary increased to some extent. It seems to have found that only a cheap article can be had at a low price, and therefore it prefers to make it more worth the while of the leading men at the bar to accept judicial positions. Here in Ontario, if we have been in any degree fortunate in procuring capable men to sit on the bench, is it not because the appointees think rather of the honor of the judicial position than of the meagre sum given them as compensation for assiduous and laborious work?

By a recent Act of Congress, owners of vessels are forbidden to advertise the advantages of the United States in order to procure passengers. This Act is the same one that has been so much canvassed of late in regard to its provision preventing the landing of those who cannot show that they will not be a charge on the public; and if they do so become a charge within a year, they will be sent back at the expense of the line that brought them. Recognizing the objection to the ocean mail service being controlled by Britain, Congress has authorized the subsidizing of mail steamers built in America.

The free exercise of the electoral franchise is ever before the citizen of the United States; consequently we find that within a year fifteen additional States have adopted the so-called Australian ballot system, making twenty-nine in all where it is in vogue.

Municipal affairs are not overlooked. Should any ten freeholders of the city of Cleveland so desire, an inspection without notice may be had of the affairs of any municipal department or officer, by three citizens to be appointed by the probate judge, and the result of their investigation is laid before the council at its next meeting. What a *furore* would be created if this were done in some cities we know—one, indeed, not far from our editorial chair. Does not Cleveland set us an example of a desire for a municipal purity which does not seem to pervade our Canadian cities to any very great extent?

A limit to the height of buildings in cities has been set by Massachusetts at one hundred and twenty-five feet. The Emperor Augustus ordained that no Roman house beside a public road should exceed seventy feet in height; so that even the restricted height is nearly double that allowed by the old Romans in the time of that Emperor and of Nero. Chicago has been emulating the Tower of Babel on a small scale by erecting houses twenty-three storeys high, and a house of thirty storeys is in contemplation. They are beginning to realize, however, that the city is built on a solid crust of only fifteen feet in thickness, below which is miry clay, and into this latter the enormous weight of building may sink. We have not, however, heard whether, for this reason, the attics of these houses command better renting figures than the ground floors. We are told there are to be earthquakes over the world in the latter days. We are not aware that Chicago is so far the antithes is of Sodom that it can hope to escape.

One State at least, Arkansas, believes in insurance companies paying their losses promptly, and, to encourage them to do this, requires them to give a bond in $20,000 with two resident sureties. In suits on policies the sureties may be joined as defendants and judgment rendered against both company and sureties.

Wisconsin follows the lead set by other States in protecting the family of a too charitably inclined testator, believing that "charity begins at home," and limits the amount he may thus will away to half his net estate.

No longer will whites and blacks be found riding together on railways in the States of Louisiana, Tennessee, and Texas, separate compartments being now required for each. A curious commentary, this, on the boasted liberty and equality of the country over which the eagle soars. In Arkansas, every telegraph station must, on its bulletin board, have noted all passenger trains that are as much as ten minutes late, and when they may be expected to arrive. Here, too, "baggage smashing" is not encouraged, since for any damage to baggage by rough or careless handling, the company must pay to the owner, in addition to his actual loss, from $25 to $200, as an encouragement to long-suffering travellers to vindicate their rights by suit.

Illinois has lowered the legal rate of interest to five per cent. In South Dakota, a contract to pay a debt in gold is illegal. In case of a repeal of the silver laws, these Dakotans will be in a bad plight.

In New Mexico, any one hundred inhabitants of a district may associate as a corporation to furnish a public reservoir, for which work the county must furnish the tools, and, when the work is finished, pay a fair rent for the right of the public to use the water. Next to pure water seems to come pure butter. Minnesota has the former in Lake Superior, and, in order to obtain the latter, requires that oleomargarine shall be placed at the disadvantage of being colored pink. The English sparrow pest has reached the Mormon territory, which now offers a bounty of half a cent for each one killed within it. Returning now to business, we find that every Saturday in New Jersey has practically been made a bank holiday by paper maturing on that day not being due till the following Monday.

The legislatures are becoming very careful of the education of minors. Some

have already, and other legislatures now follow their lead in making it a misdemeanor to give or sell them cigarettes. The "Blue Laws" of Connecticut were rather more strict. They enacted "that no person under the age of twenty-one years, nor any other that hath not already accustomed himself to the use thereof, shall take any tobacko, untill hee hath brought a certificate under the hands of some who are approved for knowledge and skill in physik that it is useful for him, and also that hee hath received a lycense from the court for the same." Some legislatures make it a penal offence for one to allow a minor to play at cards in his house without the written consent of his parent or guardian. Minnesota follows the good example of North Dakota and excludes any one under seventeen years of age from the court-room during criminal trials, and Arizona forbids the marriage of girls under sixteen, the limit of Russia and Italy. Every teacher in the public schools of Maine is required to spend not less than ten minutes weekly in instruction in the principles of kindness to birds and animals.

Those engaging in the business of furnishing abstracts of title to the soil of Wyoming must first provide themselves with complete abstracts of all the territory they propose to cover, and also give a $10,000 bond with which to indemnify misled purchasers. Minnesota has its eye on the Torrens system with a view to its adoption.

A judge in Nevada must literally earn his salary each month; for before he can draw it he must make an affidavit that no cause in his court remains undecided, since the trial of which ninety days have elapsed. California provides for a law library in each county by imposing a tax of one dollar on every civil action in the Superior Court. This is the more remarkable in that that State is the head centre and stronghold of the now celebrated and notorious "Farmers' Alliance," whose candidates for judgeships are absolutely ignorant of any law, and, as they profess to "do justice apart from the legal aspect of the case," we should not have supposed that a law library would have had any attraction for them, or have found favor in their eyes. They know less law than "Necessity," and have become a laughing-stock throughout the country. One of its protegés indeed, to whom we referred *ante* p. 208, has defied the Supreme Court of Kansas by setting aside its order in a foreclosure suit. To enforce his own order, he caused the arrest and imprisonment of the receiver of the property for contempt of court in obeying the order of the highest tribunal, and caused the arrest of the sheriff for releasing the receiver upon the writ of *habeas corpus* granted by the Supreme Court.

It all depends whose ox is gored. We are reminded of this fact by the action of this same legislature, which is controlled by the "Alliance." This legislature has requested Congress to pass a law giving any farmer the right to borrow from the United States (not from the State of California, oh no!), on mortgage at *two* per cent., such sums as he may desire, not exceeding $5,000, or *sixty* per cent. of the value of his farm. We are again reminded, this time of "Brother Tham" in "Lord Dundreary," who told Dundreary that he had bought a farm and then asked his brother to pay for it.

The belief in the uselessness of the grand jury system has pervaded the far west. By the constitution of South Dakota, adopted two years ago, the legislature is authorized to modify or abolish it; the legislature has accordingly reduced the number of jurors to six, of which five may find a true bill. The constitutions of Wyoming and Kentucky cut the grand jury down to twelve, and the former permits its abolition. In civil cases both the latter State and Arizona make nine petit jurors competent to return a verdict in civil cases.

A desire to observe the letter rather than the spirit of their constitutions is to be observed in many States. Several of these have a constitutional provision that no act shall take effect until it has been published throughout the State, in order that the citizens may first become familiar with it; but the same provision also enacts that "in case of emergency," or if the "public welfare requires," it may take effect at once. In Indiana one hundred and fifty-five out of two hundred of the acts of last session declare that that particular act is a "case of emergency," and consequently it goes into effect forthwith. In Tennessee, two hundred and thirty out of two hundred and sixty-five acts are thus instantly made law, one of which is to amend a township charter by inserting after the word "lot," in one place, "thence west four chains to a stake, thence north four and one-half chains to an oak tree, thence west three chains to a stake, thence north two chains to the corporation line at the coal chute," after which follows "Sec. 2. Be it further enacted that this act take effect from and after its passage, the *public welfare requiring it.*" Out of one hundred and eighteen acts of the Texas Legislature, one hundred and thirteen contained the "emergency clause."

Notwithstanding many of the vagaries and peculiarities of our neighbors mentioned above, we can glean a great deal of good from their legislative enactments, and the time of our House of Commons would be very much better employed in applying to our own country the more useful of their statutes than in bringing in a stereotyped form of "majority" and "minority" reports, which in many instances might equally well, except as to details, have been written before the first meeting of the committee.

MUSIC IN COURT.

"In every age and in every clime there are varieties of musical idiom which are unsympathetic, if not unintelligible, to other generations than those among whom they are first current; and, still more, the very principles that govern it have been and are so variously developed in different times and places that music which is delightful at one period or to one people is repugnant at another epoch or to a different community." Thus saith the Encyclopedia Britannica (*sub nom.*, Music).

'Tis well in reading the law to remember that there is music and music: music of the stars and music of more mundane performers.

Those who have heard the musical performances of public school children can sympathize with Mr. Webber, of La Porte, Ind. The school authorities in

that Hoosier town resolved that each pupil in the high school should employ a certain time in the study and practise of music and should get a music-book to use. Mr. W. told the superintendent that he did not believe it was for the best interest of his son to participate in the musical studies and exercises of the high school, and did not wish him to do so. The youth himself, more fearful of domestic than of scholastic punishment, declined to modulate his voice in unison with his fellows, and was suspended. The father went to law; but, like many another, paid heavily for the pleasure of seeing his name in the reports. The Supreme Court of the State held that a boy could be expelled for refusing to get a music-book and study and practise the art. (*State* v. *Webber*, 108 Ind., 31 S.C., 58 Am. Rep. 30.)

On the other hand, sometimes the courts will restrain music. In the *Albany Law Journal* (vol. 43, p. 21) we find these words: "A wild and enthusiastic amateur insisted upon practising the violoncello in his flat every day for eight hours. On Sundays he usually took an extra whack at it, so as to keep his elbows limber for the coming week. He was sued by a west-end swell in an adjoining flat, who declared in court that the violoncello 'hurt his feelings, until he was near dead.' There was a long array of counsel on both sides, and the court expressed the opinion that three hours a day was long enough for a human being to play on the violoncello." If we had been present when judgment was delivered in that case we would have said, as *amicus curiæ*, that when the celebrated fiddler Geàrdini was asked how long it would take to learn the violin, that virtuoso replied, "Twelve hours a day for twenty years!" and if that time for a small instrument like the violin, how long for a giant like the 'cello? Mr. Justice Kekewich considered it quite the thing to object to a steam-organ which played—worked, we believe, he called it—from six to ten every evening except Saturday, when it went a little longer (23 Can. L.J. 277).

Judge Stephen on one occasion remarked that under the London Acts a householder of that metropolis who does not like the music of the barrel-organ can order a performer on that well-known and easily played instrument to go away out of his hearing. In the case in which he made that remark his lordship was considering concertina playing. A member of the Salvation Army had got into trouble for a breach of a by-law in Truro, England, enacting that every person sounding or playing upon any musical instrument, or singing, or making any noise whatever, in any street or near any house in that borough, after having been required by any householder resident in that street or house, or by any policeman, to desist, etc., shall be punished if he does not. The judge thought there was nothing unreasonable in the law. While he considered it an act that no one would visit with severity, on the other hand it was an extreme annoyance to have a man playing under your window with a concertina for a couple of hours, and having a number of people to listen to it and sing; it might be a great nuisance. His lordship dared to say that there were many places where the performer could play his little instrument without getting into trouble (30 Alb. L.J. 281).

An English county court had to consider the case of an unfortunate builder

and contractor. He was busy out of doors all day long, and was wont at night, at home, to write his letters, make up his estimates, take out his quantities, and make intricate calculations requiring close mental application. He had no trouble with his work until the days of General Booth's revival; then the Army came to a building near by and with their "melodious din" so disturbed him that he made a number of serious mistakes. So to do right he had to wait until they ceased, and as the valiant soldiers were at it vigorously from 6 p.m. to 10 p.m or 11 p.m., with cornet, flute, harp, sackbut, psaltery, dulcimer, and all kinds of music—no, no, we mean with their cornets, tambourines, fifes, accordeons, and drums, shouts of "Amen!" and hallelujah choruses and stamping—if he waited until they left he had to sit up into the wee sma' hours, and thus lost much of his natural rest. The outside rabble by their conduct and their language added to the babel, or bedlam, sounds. The court enjoined this sort of thing, with one shilling damages (28 Alb. L.J. 322). How can one expect musical experts in a country where there are such judges!

On this side of the Atlantic we do better. Bella Nunn (as valiant a leader of armies as was the most illustrious member of her family) was convicted for beating a drum on a public street in London, Ont., contrary to a by-law of that city; but she was discharged by Rose, J., on appeal. The judge held that under 47 Vict. (O.), c. 32, s. 13, s-s. 12, the by-law was *ultra vires* in seeking to prohibit the beating of drums simply without evidence of the noise being unusual, or calculated to disturb the inhabitants. The evidence was of playing a drum, and his lordship asked, anxiously, "Am I judicially to know that beating a drum and playing a drum are the same?" (*Reg.* v. *Nunn*, 10 Ont. P.R. 395.)

The Supreme Court of Michigan held that an ordinance of the city of Grand Rapids, which provided that "no person or persons, association or organization, shall march, parade, ride, or drive, in or upon or through the public streets of the city, with musical instruments, banners, flags, torches, flambeaux, or while singing or shouting, without having first obtained the consent of the mayor or common council of the city," was unreasonable and invalid; and members of the Salvation Army who were arrested for having paraded contrary to the ordinance were discharged. The learned judge made the following remarks: "It has been customary from time immemorial, in all free countries, and in most civilized countries, for people who are assembled for common purposes to parade together, by day or reasonable hours at night, with banners and other paraphernalia, and with music of various kinds . . . These processions are a natural product and exponent of common aims, and valuable factors in furthering them." (*Frazee's* case, 35 Alb. L.J. 6.) In cultivated Boston, however, the cornet player in a Salvation Army was held to be an "itinerant musician" and so bound to take out a license before he blew, although he claimed that his playing was done as a matter of religious worship only, using for man's sins "antidotes of medicated music." (*Com.* v. *Plaisted*, 39 Alb. L.J. 237.)

The North Carolinian judge in the great case of *The State* v. *Linkhaw* (69 N.C. 214) would not stop the well-intentioned but laughter-stirring efforts of a worthy church member to worship God in a service of song. The judges in that

State are still musical and will not countenance the undue stoppage of harmonic exercises. A female prisoner (who doubtless had heard of Paul and Silas) refused to stop singing, although her performance greatly annoyed the sick wife of the jailer. The jailer cruelly and severely beat her with many stripes and a horsewhip. He was fined therefor $100, and the court held the amount was not excessive. (*State* v. *Roseman*, 43 Alb. L.J. 366.)

In the old days in Scotland people of any pretensions had to provide themselves with Psalm-books, just as nowadays schoolboys in Indiana have to get music-books. The statute passed in the sixth year of James VI. says "that all gentil-men, housholders, and uthers worth 300 marks of yeirly rent or above, and all substantious yeomen or burgesses, likewise housholders, esteemed worth 50 poundes in lands or gudes, be holden to have an Bible and Psalme buik in vulgar language in their houses, for the better instruction of themselves and their families in the knowledge of God, within year and day after the date heirof, ilk persone under the paine of X poundes" (chap. 72). But the clergy in Scotland in those days had no real love for music. Buckle gives us the following extract from the Registers of the Presbytery of Glasgow: "Sept. 22nd, 1649. The quhilk day the Sessionne caused mak this act, that ther sould be no pypers at brydels, and whoever sould have a pyper playing at their brydell on their marriage day sall lose their consigned money, and be farder punished as the Sessionne thinks fitt." Singing on New Year's Eve was forbidden by the church authorities in Aberdeen; no one could "give any meatt or drink to the songsteries or let theme within their house," and the singers were to be "put in prisonn." (Buckle's Hist. of Civil Law, vol. 3, c. 4.)

Sometimes there is music in court of a truth. Not long since, Mr. Henry E. Dixey, the comedian, applied to the Supreme Court of New York for an injunction to restrain some other fellow from singing a song which, he alleged, was an infringement of his copyright in "It's English, you know." The defendant's counsel wanted Mr. D. to sing the song, but Mr. D. evidently did not want to sing (probably he was too much impressed with the dignity of the court), and the judge said the words would be more satisfactory to him. Afterwards the leader of the Boston Museum Orchestra was called and sworn. He took his violin and played the tune, to the great relaxation of the facial muscles of the court and spectators. The other song, "Quite English," was then played by the witness, and the resemblance to the first was so close that all recognized it. The performer then gave "When the Band Begins to Play," but he did not think that there was much resemblance between this and the others (32 Alb. L.J. 241). Judge Taney once upon a time allowed a professional singer to be sworn (how ran the oath?) and to sing "The Old Arm Chair," and another song, over which the parties were contending, to the jury, and as evidence (Tyler's Life of Judge Taney, pp. 312-13); and in our favorite case of *State* v. *Linkhaw* (*v. sup.*) one of the witnesses, being asked to describe Brother Linkhaw's peculiar style of singing, rendered a verse in his voice and manner with such success that, as the reporter says, "it produced a burst of long and irresistible laughter, convulsing alike the spectators, the bar, the jury, and the court," and

doubtless went far to win the verdict of guilty. The general introduction of such exhibitions and performances in court would certainly be edifying and have the effect of keeping the jurors awake.

To a mind saturated with poesy, the word "minstrelsy" brings up notions of the minstrel infirm and old, his withered cheek and tresses gray, one who had known a better day (like Noah before he went into the ark), the harp, and the orphan boy staggering thereunder. It and the phrase, "entertainment of the stage," were thoroughly discussed by the Court of Appeals in New York, some five years ago, in an action brought by the mayor and council of New York city against Eden Musee American Co. (102 N.Y. 593). The defendants maintain an exhibition of wax-works, "not funny, but calm and classical," and charmed the ears of all beholders with the entrancing strains produced by the band of instrumental musicians known as "Prince Lichstenstein's Hungarian Gypsy Band," which gave concerts in a room or alcove opening into but above a large hall. The mayor wanted the company to take out a license, without which it is unlawful "to exhibit to the public in any building, garden or grounds, concert-room or other room in New York city, any interlude, tragedy, comedy, opera, ballet, play, farce, minstrelsy, or any other entertainment on the stage, etc., etc.," alleging that the music furnished was "minstrelsy." The counsel engaged hurled an immense amount of learning, antiquarian, legal, poetic, and dictionaretic, on the subject of minstrels and minstrelsy, at the court; the judges dodged it and did not decide the question of main interest to us, "What is minstrelsy?" but, saying that the word has a much wider meaning now than in days of old, held that the performance in question was "an entertainment of the stage," and that a license must be obtained.

We readily pass from minstrelsy to bards. According to the old Welsh laws, "the bard of the household" was a man of considerable importance, no mere musician, but, as Herr Klesmer said, "he helped to rule the nation and make the age as much as any other public man; he counted himself on level benches with legislators"; although by statute his harp was only worth six score pence and his tuning key twenty-four pence. He was the eighth of the fourteen individuals entitled to sit upon chairs in the palace of the king. He had his land free, and his horse; his linen clothing had to be supplied by the queen, and his woollen garments by her royal consort. He sat next to the chief of the household at the three principal feasts, and that functionary had to hand him his harp. When singing was in order, the chaired bard had to begin, and the law prescribed that his first song should be one of praise to God, the second one of praise to the king who owned the palace where the high revels were being held; but if there were no such monarch, then any king might be glorified. After this performance, the bard of the household had to sing three songs on various subjects. If the queen desired melody the bard of the household had to sing to her without limitation, but (fortunately for the non-musical) in a low voice, so that the hall might not be disturbed by him (Ven. C., B.I., c. 14). When he entered upon his duties he had a harp from the king and a gold ring from the queen, and it was against the law for him to part with his harp (Dim. C., B.I., c. 18). The

Venedotian Code only called for the gift of a throw-board, made of the bone of a sea animal, from the king.

The three Welsh codes vary somewhat as to the bard's share of spoils. The Venedotian says, "He is to have a cow, or an ox, from the booty obtained by the household from a border country after a third has gone to the king; and he is, when they share the spoil, to sing 'The Monarchy of Britain' to them." The Dimetian Code says: "If the bard of the household recite poetry, in the taking spoil with the king's household, he is to have the best animal of the spoil; and if there be preparation for battle, let him recite the song called 'The Monarchy of Britain' before them"; while the Gwentian says he is "to have a steer and a man's share," and at the time of fighting he was to sing "The Sovereignty of Britain" at the head of the household (Ven. C., B.I., c. 14; Dim. C., B.I., c. 18; Gwen. C., B.I., c. 19). The Chief of Song was another dignified officer whose duties were prescribed by the laws of Howel. He had a fee of twenty-four pennies as a bridal present from every maiden led to the altar; widows who perpetrated matrimony had nothing to pay for the music (Dim. C., B.I., c. 24).

R.V.R.

COMMENTS ON CURRENT ENGLISH DECISIONS.

The Law Reports for September comprise (1891) 2 Q.B., pp. 369-512; (1891) P., pp. 301-322; and (1891) 2 Ch., pp. 605-708.

INFANT—APPRENTICESHIP DEED, ACTION TO ENFORCE—COVENANT OF INFANT TO PAY PREMIUM.

Walker v. *Everard* (1891), 2 Q.B. 369, was an action brought to recover payment of the balance of a premium due under a covenant in an apprenticeship deed made while the defendant was an infant. The defendant set up his infancy at the time of the making of the covenant as a bar to the action. The jury found that the deed was a provident and proper arrangement for the infant, and necessary if he wished to learn the business, and that the premium was fair and reasonable, and that the plaintiff had given the required instruction. Grantham, J., gave judgment for the plaintiff, and the Court of Appeal (Lord Esher, M.R., and Fry and Lopes, L.JJ.) upheld it, holding that the providing an infant with necessary instruction in business stands on the same footing as ordinary necessaries, and that he was therefore liable on his contract to pay for them; but that a bond or covenant given by an infant to pay for such instruction is not conclusive as to the consideration, which may be inquired into as if there had been no deed. That whether education in a trade or business is a "necessary" is a question of fact to be determined by the circumstances of the infant.

LANDLORD AND TENANT—FORFEITURE OF LEASE ON BANKRUPTCY OF LESSEE.

Smith v. *Gronow* (1891), 2 Q.B. 394, is a decision upon the construction of a lease, which contained the usual covenant on the part of the lessee not to assign or sublet without the consent of the lessor, and also a proviso for re-entry if "the lessee, his executors, administrators, or assigns, should become bankrupt." The

lessee assigned the term with the consent of the lessor, and subsequently became bankrupt, and the short point was, Did the proviso for the re-entry take effect? It is almost needless to say that Wright, J., had no difficulty in coming to the conclusion that the proviso referred only to the bankruptcy of the person who, for the time being, was possessed of the term, and that consequently no forfeiture had been incurred. Another question was raised but not determined, and that was, whether, assuming the bankruptcy had worked a forfeiture, would the subsequent annulment of the bankruptcy undo the forfeiture? The learned judge was inclined to the opinion that it would not.

LOCOMOTIVE ON HIGHWAY—LESSOR AND LESSEE OF CHATTEL—NEGLIGENCE OF LESSEE—OWNER OF VEHICLE, LIABILITY OF—MASTER AND SERVANT.

In *Smith* v. *Bailey* (1891), 2 Q.B. 403, the Court of Appeal (Lord Esher, M.R., and Bowen and Kay, L.JJ.) took occasion to disapprove of *Stables* v. *Eley*, 1 C. & P. 614, in which case, according to the report, it was held that if a man allows a carriage to go out with his name upon it, he holds himself out as liable to any person injured through the negligence of any person driving it. The court admitted there might be *primâ facie* such a liability, but it was one which was not conclusive, but might be rebutted by showing that the person whose name appeared on the vehicle was not the owner, or was otherwise not responsible for the driver. In this case the defendant was the owner of a traction engine on which his name was affixed, as required by the Locomotives Act, 1875, and had let it for three months for hire. While in the possession and control of the lessee, and through his negligent management of the engine, the plaintiff was injured: and it was held that the defendant was not liable for the injury.

BAILMENT—BAILOR AND BAILEE—LIABILITY OF BAILEE FOR NEGLIGENCE OF HIS SERVANT—MASTER AND SERVANT.

The *Coupé Company* v. *Maddick* (1891), 2 Q.B. 413, is a case of a kindred character to the preceding. In this instance the action was between the bailor and bailee of a horse and carriage. The defendant had hired a horse and carriage from the plaintiffs, and the defendant's coachman, in place of taking them, as was his duty, to the stable, drove for his own purposes in another direction, and while so doing the horse and carriage were injured through his negligent driving. The action was tried by a County Court judge, who thought the defendant was not liable, on the authority of *Storey* v. *Ashton*, L.R. 4 Q.B. 476; but the Divisional Court (Cave and Charles, JJ.) reversed his decision, pointing out very clearly the difference which exists in the liability of the hirer of a vehicle for injury done to a stranger, and an injury done to the thing bailed; for while he is not responsible for injuries done by his servant to third persons when the servant is not acting in the course of his employment as servant, he is nevertheless, by virtue of his contract with his bailor, bound to return the thing bailed in good order, and is therefore responsible for any injury done to it until he returns it. It is curious that there was no direct authority upon the point.

MARRIED WOMAN, CONTRACT BY—MARRIED WOMAN'S PROPERTY ACT, 1882—(45 & 46 VICT., C. 75) S. 1, SS. 2, 4—(R.S.O., C. 132, S. 3, SS. 2, 3, 4)—RESTRAINT ON ANTICIPATION—LIABILITY AFTER DEATH OF HUSBAND.

Pelton v. *Harrison* (1891), 2 Q.B. 422, still further exhibits the apparent futility of all legislative attempts to make a married woman's property liable for her contracts. In this case, a married woman who had separate property subject to a restraint on anticipation incurred a pecuniary liability. After her husband's death she was sued and judgment recovered against her in the form settled in *Scott* v. *Morley*, 20 Q.B.D. 120, and the question for the court was whether the property which had ceased to be subject to the restraint on anticipation by reason of the husband's death was now liable to satisfy the judgment? The Court of Appeal (Kay and Lopes, L.JJ.) decided that it was not. The *rationale* of the decision is that a married woman can, by her contract, only bind her separate estate which she has at the time of the contract, or afterwards acquires, which is not subject to restraint on anticipation; the property sought to be affected was not capable of being bound at the time of the contract because of the restraint on anticipation, and it was not separate property afterwards acquired, and therefore it was not liable. The reasoning appears to be perfectly sound, though we cannot help thinking that the real intention of the legislation has been defeated.

MANDAMUS TO MAGISTRATE TO STATE A CASE—CRIMINAL CAUSE OR MATTER.

In *Ex parte Schofield* (1891), 2 Q.B. 428, an attempt was made to appeal from a decision of a Divisional Court refusing to grant an order *nisi* for a mandamus to magistrates to compel them to state a case for the opinion of the court under the provision of the Public Health Act, 1875. The appeal was rejected on the ground that the proceeding was "a criminal cause or matter," and therefore not appealable.

VENDOR AND PURCHASER—SALE OF LAND—VENDOR IN POSSESSION PENDING CONTRACT, LIABILITY OF, FOR DAMAGES TO LAND—CLAIM FOR COMPENSATION AFTER COMPLETION.

Clarke v. *Ramuz* (1891), 2 Q.B. 456, throws light on the duties and liabilities of a vendor of land who remains in possession pending the completion of the contract of sale. In this case, pending the contract of sale, a trespasser entered and without the knowledge of the vendor or purchaser removed a quantity of the surface soil; the vendor had taken no precaution to protect the property. After the sale had been completed and conveyance made to the purchaser, the damage was discovered, and the present action was brought by the purchaser against the vendor to recover damages for the injury thus done to the land; and two questions arose—first, was the vendor liable at all; and, second, if liable before conveyance, had the delivery of the conveyance put an end to his liability? The case was tried by Grantham, J., with a jury, and judgment was given in favor of the plaintiff; and this judgment was affirmed by the Court of Appeal (Lord Coleridge, C.J., and Bowen and Kay, L.JJ.), the latter court holding that under such circumstances a vendor is a trustee for the purchaser, and bound to exercise reasonable diligence; that though the conveyance puts an end to all contractual

obligations between vendor and purchaser which are intended to be satisfied by the execution of the conveyance, it does not necessarily discharge a liability of this kind unless the circumstances of the case indicate that such was the intention of the parties.

MORTGAGEE—SUBSEQUENT LEASE BY MORTGAGOR—NOTICE TO ATTORN TO MORTGAGEE—POSSESSION BY TENANT AFTER NOTICE.

In *Towerson* v. *Jackson* (1891), 2 Q.B. 484, the circumstances under which a tenant of a mortgagee under a demise subsequent to the mortgage will become tenant to the mortgagee are discussed. The plaintiff endeavored to maintain that his remaining in possession after receiving notice from the mortgagee to pay his rent to him was sufficient; but the Court of Appeal (Lord Esher, M.R., and Bowen and Kay, L.JJ.) were clear that the mere continuance in possession of the tenant after the receipt of the notice is not conclusive evidence of the creation of a new tenancy between him and the mortgagee, and the decisions in *Brown* v. *Storey*, 1 M. & G. 117, and *Underhay* v. *Read*, 20 Q.B.D. 209, to the contrary, were held to be erroneous. In the present case the plaintiff had tendered the rent to the mortgagee, but the latter had refused to accept it unless the plaintiff agreed to terms of tenancy, which he declined to do. The court therefore held that no new tenancy had been created.

CONTRACT—IMPLIED COVENANT—AGREEMENT FOR SALE OF PRODUCTS OF BUSINESS—VOLUNTARY SALE OF BUSINESS.

In *Hamlyn* v. *Wood* (1891), 2 Q.B. 488, the plaintiff had agreed to buy and the defendants had agreed to sell, at a certain specified rate, the grains from the defendants' brewery for ten years. Before the ten years had elapsed, the defendants sold their brewery; and the present action was brought for breach of an alleged implied covenant, that the defendants would not during the ten years by any act of their own put it out of their power to continue the sale of grains to the plaintiff. Mathew, J., who tried the case, gave effect to the plaintiff's contention; but the Court of Appeal (Lord Esher, M.R., and Bowen and Kay, L.JJ.) reversed his decision, being of the opinion that such an implied contract only arises when it is necessary in order to carry out the presumed intention of the parties and to prevent a failure of consideration; for instance, if n the present case the defendants had paid down a sum for the grains for ten years, an implied agreement on the part of the defendants not to do anything to prevent themselves from supplying the grains during the ten years might (though the court even in that case do not say positively that it would) have arisen; but as in this case the grains were to be paid for as delivered, there was no such necessary implication as to the intention of the parties, nor any such failure of consideration as to warrant the court in holding there was any such implied agreement as claimed by the plaintiff.

INTERPLEADER ISSUE, JUDGMENT ON—INTERLOCUTORY ORDER.

In *McNair* v. *Audenshaw Paint Co.* (1891), 2 Q.B. 502, the Court of Appeal reaffirmed the opinion expressed in *McAndrew* v. *Barker*, 7 Ch.D. 701, that the order

made on the trial of an interpleader issue is an interlocutory and not a final order.

STATUTE OF LIMITATIONS (21 JAC. I.; C. 16, S. 3).

In *Reeves* v. *Butcher* (1891), 2 Q.B. 509, the sole question was whether the plaintiff was barred by the Statute of Limitations, 21 Jac. I., c. 16, s. 3. The action was to recover money lent under a written agreement, which recited an agreement for a loan for five years "subject to the power to call in the same at an earlier period in the events hereinafter mentioned." The defendant agreed to pay interest quarterly, and the plaintiff agreed not to call in the money for five years if the interest were regularly paid; and it was provided that if defendant should make default in payment of the interest for twenty-one days, the plaintiff might call in the principal. No interest was ever paid. The action was commenced within six years from the end of the period of five years. Day and Laurance, JJ., held that the action was barred, that the statute began to run from the earliest period at which the plaintiff could have sued for the money, viz., twenty-one days after the first quarter's interest fell due; and the Court of Appeal (Lindley, Fry, and Lopes, L.JJ.) affirmed the decision.

None of the cases in the Probate Division require to be noticed here.

EXPROPRIATION OF LAND—LEASEHOLD—PURCHASE MONEY, PAYMENT OF—REVERSIONER UNKNOWN.

Gedye v. *Commissioners of H. M. Works, etc.* (1891), 2 Ch. 630, though a case turning to some extent on the construction of an English statute authorizing the expropriation of land for public buildings, yet furnishes a principle for the construction of other statutes of a similar character, and is therefore proper to be noticed here. Certain land, of which the plaintiff was at the time in possession as lessee for an unexpired term, was expropriated for part of the site of the Royal Courts of Justice. The lease under which the plaintiff held was originally for 300 years, and comprised other lands, and the rental was £5 a year. The expropriation was made in 1866, and the term would expire in 1878. The plaintiff and his predecessor in title had paid no rent for many years, and it was unknown who the reversioner was; the value of the leasehold interest was fixed at £500, and paid to him, and the sum of £705, the value of the reversion, was paid into court for the party entitled; no claim had been made to it by the reversioner, and the plaintiff, as having been in possession when the expropriation was made, now claimed that the money should be paid out to him; but North, J., held that the lease not having expired at the time of the expropriation the plaintiff had never been in possession of the reversion at all so as to acquire any title against the reversioner; and in the absence of evidence to show that no rent had been paid by the tenants of the other property included in the original demise, there was no evidence that the reversioner had been barred prior to the expiration of the demise; and this opinion was confirmed by the Court of Appeal (Lindley, Bowen, and Kay, L.JJ.).

WILL—CONSTRUCTION—GIFT OF INCOME DURING LIFE OR WIDOWHOOD—GIFT OF LEGACIES OUT OF FUND ON DEATH OF WIFE.

In re Tredwell, Jeffray v. *Tredwell* (1891), 2 Ch. 640, is a decision of the Court

of Appeal (Lindley, Bowen, and Kay, L.JJ.) overruling a judgment of North, J., upon the construction of a will. The point involved was a simple one: The testator had directed his trustees to pay the income of a fund to his wife during her life, or until she should marry again; and from and after her marrying again he directed them to pay an annuity of £2,000 during her life; and after her death he directed the trustees to pay certain legacies, all of which, though payment was postponed until his wife's death, he directed to be taken as vested on his own death. And the testator also gave £5,000 among such charitable institutions as his wife should by will appoint; and gave his residuary estate to three persons equally. The testator's wife survived him and married again; and the question for the court was whether the payment of the legacies was thereby accelerated. North, J., held that it was; but the Court of Appeal considered that as there was no ambiguity in the words of the gift, and no doubt appearing on the will as to the testator's intention, the legacies payable at the death of the widow could not be paid before the happening of that event; and the principle of construction established by *Jones* v. *Westcomb*, 1 Eq. C. Ab. 245, was held not to be applicable.

POWER—RELEASE—TENANT FOR LIFE—RELEASE OF POWER BY TENANT FOR LIFE FOR HIS OWN BENEFIT—DECLARATION OF RIGHT BY COURT.

In re Radcliffe, Radcliffe v. *Bewes* (1891), 2. Ch. 662, was a summary application to the court to obtain a declaration of right and an order on trustees to transfer a fund to the applicant. The applicant was tenant for life under his marriage settlement, and had power to appoint the trust fund among the children of the marriage. In default of appointment the fund was to be held in trust for the children in equal shares, to be vested interests at twenty-one or marriage. The only issue of the marriage were three sons, one of whom died in infancy. The other two attained twenty-one, and one had died unmarried and intestate after the death of his mother. The applicant was administrator of this son's estate, and had executed a deed absolutely releasing his power of appointment, and had called on the trustee to transfer to him a moiety of the trust funds, which they refusing to do, the present application was made, praying a declaration that he was in the events which had happened entitled to half the fund, and for an order on the trustees to transfer it to him. North, J., though of opinion that the applicant was entitled to the fund as claimed by him, yet considered that the court could not actively assist him to obtain possession of it, and the application was accordingly refused.

WILL—GENERAL POWER OF APPOINTMENT—EXERCISE OF POWER BY GENERAL DEVISE—POWER OF REVOCATION AND NEW APPOINTMENT—WILLS ACT (1 VICT., C. 26), S. 27—(R.S.O., C. 109, S. 29).

In re Brace, Welch v. *Colt* (1891), 2 Ch. 671, a testator having a general power of appointment by deed or will had before making his will duly exercised the power by deed, in which, however, he reserved a power of revocation and new appointment. In his will he made a general devise of his real estate; and the

question for the decision of North, J., was whether this had the effect of revoking the previous appointment, so that under the Wills Act, s. 27 (R.S.O., c. 109, s. 29), the land in question would pass under the general devise as being a new appointment. This question, North, J., determined in the negative. At page 675 he says, "Wherever there has been a complete appointment under a power, an appointment which entirely disposes of the property, you must get rid of that appointment in some way or other before any further appointment can be made"; and he held that the mere making of a general devise of the property in a subsequent will could not be construed as a revocation of an appointment previously made.

Notes on Exchanges and Legal Scrap Book.

ESTATE BY ENTIRETY—DIVORCE.—An estate by the entirety is converted by absolute divorce into a tenancy in common (*Stelz* v. *Shreck*, N.Y. Court of Appeals, October, 1891).

ACCIDENT INSURANCE—INJURY BY CARELESSNESS.—The deceased, while running towards an approaching train to get the mail bags, stumbled and fell against a moving engine. In an action to recover under a policy of insurance which contained a clause insuring against death or other injury resulting from "external violence and accidental means," it was held that the plaintiff could recover; that the efficient and proximate cause of the death was the accident, and that the injury was not caused by a voluntary exposure to unnecessary danger, which was one of the exceptions not covered by the policy. In this case the court said (*Equitable Accident Insurance Co.* v. *Osborne*, 9 *Southern Reporter* 869): "Exceptions of this kind are construed most strongly against the insurer, and liberally in favor of the insured. This is now the settled rule for construing all kinds of insurance policies, rendered necessary, especially in modern times, to circumvent the ingenuity of the insurance companies in so framing contracts of this kind as to make the exceptions unfairly devour the whole policy."

NOTICE REQUISITE IN WEEKLY TENANCIES.—Notice always has reference to the letting. Thus in a letting from week to week a clear week's notice, expiring on the day the rent becomes due, will be sufficient. That is the rule laid down in a popular text-book for every one. It does not seem, however, to have been followed in a recent case at Stockport, where a blacksmith was in the employment of a railway contractor who was constructing a railway, and occupied one of the huts provided for the convenience of the workmen. Plaintiff's tenancy began on a Thursday. The site of the hut being required for the erection of a station, notice was given on a Saturday to the plaintiff requiring him to give up

possession on or before the following Saturday. Believing he should have notice from Thursday to Thursday, plaintiff remained in the house over the Saturday, and on the Monday defendant proceeded to take off the roof, and, of course, plaintiff questioned his right of interference. His advocate sought to show that the notice must expire at the end of a week, dating from the commencement of the tenancy, although it might not be necessary to give a full week's notice. His honor, however, said he had very carefully considered the case of *Jones* v. *Mills*, which was the authority, and found that the judges did not entirely agree. One said a week's notice was necessary, but this was contested by two other judges, and the only thing definitely settled was that in a weekly tenancy there must be some reasonable notice. He held, therefore, that the notice in this case was a reasonable notice, and gave judgment for defendant.—*Irish Law Times.*

LAW SCHOOLS AND LEGAL EDUCATION.—President Elliot, of Harvard, says: "It is hard for you and me to realize what a prodigious change has taken place in this country in regard to a legal education since the days of Judge Story and his associates. It is only sixty-two years ago, and yet I think we may say that the methods of legal education in the United States have been revolutionized in that short period. The Harvard school really had been in existence for a dozen years, but chiefly as a school where a few young men came in contact with a teacher of law as a private pupil does with his teacher. It took Judge Story ten years to get as many as eighty-seven students in the law school, and it was by far the largest school in the United States, and, there were very few of them anywhere else, only two or three in the whole country; and as it is now, there are fifty law schools in the United States, all of them connected with universities; almost all of them really connected, but few nominally in connection with universities. But the old-fashioned mode of studying law has almost completely disappeared from the United States, just as the old-fashioned mode of studying medicine has completely disappeared. But in medicine this great change came earlier, nearly forty years earlier, and we have now practically abandoned the English method of preparing for the bar. There are 4,000 students now in the law schools of the United States. They are all university law schools, just as in France and Germany. This change has come about slowly, and perhaps is not wholly accomplished; and yet it is one of the greatest revolutions that has ever taken place in American institutions."

LIABILITY OF RESTAURANT KEEPER.—In the City of London Court, on Sept. 2nd, before Judge Kerr, in the case of *Baggs* v. *Hodgson*, an important question was raised affecting the liability of restaurant proprietors for the loss of their customers' property. The defendant was the owner of the Raglan Hotel, Aldersgate Street, and the plaintiff (according to his solicitor's statement) went there to take his lunch. While there the defendant's wife, who assisted him in the business, asked the plaintiff to let her move his coat from where he had placed

it behind the chair to some other place which would be more convenient, and make room for other customers who had come in. The plaintiff demurred to that being done, but the request was repeated, and then he allowed his coat to be moved. The defendant's wife hung the coat up, but afterwards it could not be found. It had been stolen, and the plaintiff therefore asked to be recompensed for the loss he had sustained. The question turned on the relationship existing between the plaintiff and the defendant, and whether they stood in the position of guest and innkeeper. The defendant's solicitor said the defendant's establishment was a restaurant. On the question of law the defendant could not possibly be held liable for the loss of the plaintiff's overcoat. His honor said the plaintiff did not go as guest to an innkeeper. He went for his lunch, and that was all the difference. The law gave the plaintiff no remedy for the loss he had suffered. There must be judgment for the defendant, with costs. The above decision is rather incomprehensible. It certainly could not be sustained under our law, and we may refer to the analogous case of *Bunnell* v. *Stern*, before the New York Court of Appeals, to show that in New York State a different conclusion was arrived at. In *Bunnell* v. *Stern* a customer took off her wrap in a shop in order to try on a cloak, and it was held that the shopkeeper was responsible for the wrap. The court remarked: "Under the circumstances, we think it became the defendants' duty to exercise some care for the plaintiff's cloak, because she had laid it aside upon their invitation, and with their knowledge, and without question or notice from them, had put it in the only place that she could (on the counter)." The above appears in the Montreal *Legal News* for August 29th. We feel that it is incumbent upon us to congratulate our contemporary on its enterprise in noting a decision of an English court three days before the case was even tried. As it is improbable that the report came by cable, the feat is all the more remarkable.

JUDICIAL NEPOTISM.—On the subject of judicial nepotism, a contributor writes to the *Law Times*: "In Ireland the late Sir Michael O'Loghlen, who held the office of Master of the Rolls, absolutely forbade his son (afterwards Sir Colman O'Loghlen, Q.C., M.P.) to practise before him. Sir Michael O'Loghlen, when at the Irish Bar in the earlier decades of the present century, had some experience of the great scandal entailed by such a system in the administration of justice. When Mr. O'Grady, Chief Baron of the Irish Court of Exchequer, and afterwards Viscount Guillamore, was on the bench, his son specialised his father's court. A brief to move a motion of course in the Exchequer was sent to a Mr. Cooper, afterwards one of the Benchers of the Irish Bar. The motion was refused by the Chief Baron, whereupon Mr. Cooper returned brief and fee to the solicitor with the request that he should send them to Mr. O'Grady, who next morning moved the motion, which was immediately granted by his father, the Lord Chief Baron. 'Why, my Lord,' said Mr. Cooper, who was in court, 'your Lordship refused to grant this motion when I moved it yesterday morning?' 'But, Mr. Cooper,' said the Chief Baron unabashed, 'you must admit

that Mr. O'Grady put the case in a different light.' 'Oh,' said Mr. Cooper, *sotto voce*, 'I presume in the light of the sun (son).' When the late Incumbered Estates Court in Ireland was first established about forty years ago, the practice in the court of one of the commissioners was virtually monopolised by his son and his son-in-law, who were retained on opposite sides to balance the judge's favor. It is very questionable whether in the long run judges' sons themselves benefit by practising before their fathers. More than one instance could be cited in which a thoroughly competent barrister, whose practice was almost exclusively confined to his father's court, lost that practice on the retirement of the judge on whose favor he was supposed to have a lien. The men who gave him briefs, not from confidence in his learning and ability, but from the fact of his having a near relative on the bench, abandoned him on the retirement of his supposed patron—a clumsy and cruel method of atoning for their own loss of self-respect in having originally employed him."

LEGAL PROFESSION IN THE BRITISH COLONIES.—Lawyers in the colonies do not find matters so easy as is reasonable, considering that there are local laws. In Canada the professions of barrister and solicitor are generally combined, and legal firms usually consist of a partnership in which one of the members devotes himself to advocacy. In Ontario a barrister belonging to an English inn has no further examination to pass, but a solicitor must serve under contract for a year with a local solicitor. In Quebec all lawyers are called advocates, and no one can practise without having passed the local examination; and further, as the law is mostly French, its practice necessitates a knowledge of the French language. In Manitoba an examination has to be passed in local law, though there is a clause in the local Act which seems to repeal this necessity as to the local knowledge in the case of barristers. In the North-west Territories a British qualification is held to be sufficient, but in British Columbia a local examination and residence are essential, except in the case of such as hold the degree of B.C.L. or LL.B. In Prince Edward Island a lawyer must have at least a year's residence in the colony, and submit to examination in local law if the authorities think fit. In New Brunswick the solicitor must have served a local solicitor for a year. In Nova Scotia a barrister can practise with a British qualification only, but a solicitor must pass an examination after serving a clerkship of four years. In New South Wales a barrister of a British inn is admitted without examination on a motion made in court in that behalf, and a solicitor from the old country can practise without examination after a residence of three months. In Victoria the conditions are the same, and application must be made to the court in the same way. The call fee for barristers is fifty guineas; for solicitors the admission fee is forty guineas. In South Australia the fee in both cases is ten guineas, and a three months' residence is all that is necessary. In Queensland the fee is also ten guineas, and there is no distinction between barristers and solicitors, the only peculiar condition being that the applicant must have two householders as a reference and advertise his application in the newspapers. In

Western Australia a lawyer must reside for at least six months in the colony, and then give four months' notice of his intention to apply for permission to practise. The fee is £10. In Tasmania all that is necessary is for the candidate to pay twenty guineas. In New Zealand the candidate must pass an examination in law, including the law of New Zealand in so far as it differs from the law of England; but should he be fortunate enough to be an LL.B., his examination will consist only of matters concerning the local law. In the South African colonies no examinations are needful; in fact, nothing is required with a British qualification but fees."—*Law Journal.*

Reviews and Notices of Books.

The Liquor License Act of the Province of Ontario and Amending Acts, with an Appendix of Forms. By His Honor J. S. Sinclair, Judge of the County Court of the County of Wentworth, and Edwin Ernest Seager, Barrister-at-law. Hamilton: *Times* Printing Company, 1891.

The book before us is a valuable adjunct to works already published on these acts, and will be of much use to students desiring to know how far the Ontario Legislature has progressed in framing laws which, no doubt, have for their object the eradication of the vice of intemperance from our province.

In the framing of all the acts of our parliament, men of ripe experience give their patient aid to put down abuses and correct errors which have been overlooked in the passing of previous statutes. But very generally the opinions of those who are ripe in experience as to the remedies required have been sacrificed (as in the case of the Ontario License Act) to the opinions of those who have a grand theory, which, like the Keeley motor, will not work successfully.

The acts and the notes of the commentator are before us. The marginal notes show what care the commentator has taken and what labor he has bestowed upon his work, and how well he has endeavored to release from the ambiguities of this and preceding acts passed for the same purpose the conflicting enactments which are bristling on the face of every page. He traces back the different acts passed in the cause of putting down illegal traffic in liquor, and the different decisions which have been made by our courts. It will be a pleasure to the student to note how the old Crooks Act has been improved upon, and how from time to time the legislature has fought to carry out what should be the true principles of legislation in the cause of temperance.

The typography of the work reflects credit upon the publisher; and to those who make the work a study, we can say, with Sheridan, "you shall see a beautiful page, where a neat rivulet of text shall meander through a meadow of margin."

No work that has been published, treating of these acts, gives so much information as the one before us; and the reader, whether he be magis-

trate, judge, or practitioner, will derive much benefit from a careful study of the premises set out, for on them he can form a sensible conclusion, even should that conclusion be at variance with that of the learned commentator.

We regret to see that Judge Sinclair falls foul of another learned commentator —the late R. A. Harrison, C.J.Q.B., and alleges that that learned commentator has overlooked in his commentaries certain legal decisions. He has not spoken unkindly of the late Chief Justice, nor do we now speak unkindly of Judge Sinclair when we say that in dealing with the competency of witnesses under this and amending acts he has lost sight altogether of the Canada Temperance Act, R.S.C., c. 106, s. 114; the amending Act of 57 Vict., c. 34, s. 13, which have made the defendants in liquor cases, and their wives, competent but not compellable witnesses.

Regina v. *Roddy* and other cases in our own courts, and latterly a recent decision of Judge Rose, *Regina* v. *Hart*, have decided that liquor cases are *quasi* criminal, and that the Ontario Evidence Act does not apply. The Ontario Legislature having no power to deal with evidence in criminal cases, it was necessary that Dominion legislation should be invoked to give to the defendant and his wife the privilege of giving evidence. The first-named act made them *competent* and *compellable* witnesses, while the latter act struck out the words *and compellable*, and yet reserved their competency should they choose to give evidence.

Those who are prepared to draw conclusions for themselves without becoming *case* lawyers will find the work of great use, as it meets to a certain extent an *obiter dictum* of the late Sir William Buell Richards—it would take a lawyer all his time to watch the vagaries of the Ontario Legislature so that he could give an intelligent opinion, and such care should not be expected from a judge unless the special provisions of the statutes are clearly placed before him.

Correspondence.

APPOINTMENT OF COUNTY JUDGES.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—"Lex" enquires in your last issue if it would "not be better to appoint County Court judges outside of the local bar"—who can doubt that it would?

It has always seemed to the writer that appointments from the local bar were most objectionable, and that only the necessities of politics, which can justify almost anything, have upheld them. Every one will admit that those appointed to administer justice should bring to the position minds as far as possible unbiased by fear, favor, or affection—by interest, enmity, or prejudice. How can the local practitioner when appointed do this? In nine cases out of ten he is a politician who thus receives his reward. We all know the rancor of

local politics and its results. Then, if a practitioner of long standing has acted for litigants at deadly enmity, he necessarily has received and dealt hard blows, and has become imbued with the strong feelings, be they friendship or animosity, which these engender. Often, too, he has had a partner, and more often still the ties of consanguinity or relationship are present to unbalance his mind. With these disturbing influences to warp his judgment, it is not in human nature to resist them entirely, and do evenhanded justice; and so litigants benefit or suffer in consequence.

It is embalmed in the pages of Gibbon that the Romans secured as far as possible the impartial administration of justice by appointing to the office of judge strangers to those amongst whom they were to dispense justice. Our legislators cannot too soon inaugurate the same system. The evils of the present system are intensified and intolerable, because, practically, there is no redress. It is in the Division Court, where the County Court judge reigns practically supreme, that these evils are most apparent. If the litigant unfortunately fails to secure the "judge's lawyer" (for such monstrosities exist), or has been obnoxious to the judge in the past, or is opposed by a favorite or friend of his honor, why he gets justice (?); and in such cases a poor man suffers beyond hope of redress. The sooner a new departure is made, as regards the appointment of County Court judges, the better, is the unqualified opinion, based upon experience, of

A COUNTRY SOLICITOR.

October, 1891.

[We shall be glad to hear from others of our readers. Our correspondent puts his case well and strongly, and his views are shared by many others. —ED. L.J.]

DIARY FOR NOVEMBER.

1. Sun.....*23rd Sunday after Trinity.* All Saints' Day.
2. Mon.....O'Connor, J., Q.B., died 1887.
3. Tues.....1st Intermediate Examination.
5. Thur.....2nd Intermediate Examination. Sir John Colborne, Lieut.-Governor U.C., 1838.
7. Sat.....Battle of Tippecanoe, 1811.
8. Sun.....*24th Sunday after Trinity.*
9. Mon.....Prince of Wales born, 1841.
10. Tues.....Court of Appeal sits. Solicitors' Exam.
11. Wed.....Barristers' Examination. Annual Fees to Law Society. Battle of Chrysler's Farm, 1813.
12. Thur.....J. H. Hagarty, 4th C.J. of C.P., 1868. W. B. Richards, 10th C.J. of Q.B., 1868.
13. Fri.....A. Wilson, 5th C.J. of C.P., 1878. J. H. Hagarty, 12th C.J. of Q.B., 1878.
14. Sat.....Falconbridge, J., Q.B.D., 1887.
15. Sun.....*25th Sunday after Trinity.* M. C. Cameron, J., Q.B., 1878.
16. Mon.....Michaelmas Term begins. H.C.J., Q.B.D., and C.P.D. Sittings begin.
19. Thur.....J. D. Armour, 14th C.J. of Q.B., 1887. Thos. Galt, C.J., C.P.D., 1887
21. Sat.....J. Elmsley, 2nd C.J. of Q.B., 1796. Princess Royal born, 1840.
22. Sun.....*26th Sunday after Trinity.*
24. Tues.....Battle of Fort Duquesne, 1758.
25. Wed.....Marquis of Lorne, Governor-General, 1878.
27. Fri.....Frontenac died at Quebec, 1698.
29. Sun.....*1st Sunday in Advent.*
30. Mon.....St. Andrew's Day. Thos. Moss, C.J. of Appeal, 1877. Street, J., Q.B.D., and MacMahon, J., C.P.D., 1887.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

[May 13, 1890.

HEWARD *v.* O'DONOHOE.

Limitations—Possession—Caretaker.

The defendant was placed in possession of certain property as caretaker by one tenant in common, who was managing the piece of property in question and other property for the benefit of himself and his co-tenants. In 1866 a decree was made declaring that this co-tenant was a trustee for himself and the other co-tenants in certain proportions, and he was ordered to convey to the other co-tenants their shares, to be ascertained by the Master. Various proceedings were taken under the decree and the shares of the different co-tenants were ascertained, the property in question being allotted to the plaintiffs, but no conveyances were executed. An order vesting the share of the plaintiffs in them was made in 1888.

Held [HAGARTY, C.J.O., dissenting], that the effect of the decree and the ascertainment of the shares was to sever the interests in the property, and that from that time the possession of the defendant became adverse to that of the plaintiffs, who could not, after that time, contend that he was in possession as their caretaker, and therefore that he had acquired a title by possession.

Judgment of ROSE, J., reversed.

J. Reeve for the appellant.

Osler, Q.C., and *A. MacMurchy*, for the respondents.

Reversed in the Supreme Court of Canada.

[May 13, 1890.

BRANTFORD, WATERLOO & LAKE ERIE RAILWAY *v.* HUFFMAN.

Bond—Condition—Breach—Damages.

The defendant, in response to an advertisement by the plaintiffs, sent in a tender for the construction by him of certain works. His tender was defective in that it was not executed by any sureties as directed by the advertisement and was not accompanied by a deposit. The tender was not accepted, but negotiations took place between the plaintiffs and the defendant in connection with it, and the defendant signed a bond conditioned to, within four days, furnish the sureties and make the deposit and execute all proper and necessary agreements for the doing of the work in question. The terms of the contract had not been settled between the parties. The defendant did not within four days furnish sureties or make a deposit or sign any agreement, and no agreements were within that time tendered to him for execution.

Held [BURTON, J.A., dissenting], that it was the duty of the plaintiffs to prepare the agreements and tender them to the defendant for execution, and that as they had not done this there was no default on the part of the defendant of which they could complain and no liability for damages.

Judgment of ARMOUR, C.J., affirmed.

[Sept. 15.

MCCAFFREY *v.* MCCAFFREY.

Voluntary conveyance—Undue influence—Confidential and fiduciary relationship—Husband and wife.

A voluntary conveyance by a husband to his wife, a woman of good business ability and

having great influence over him, of a large portion of his property, executed at a time when his physical and mental condition were greatly impaired, was set aside.

The doctrine of undue influence and fiduciary relationship discussed.

Judgment of ROSE, J., reversed, HAGARTY, C.J.O., dissenting.

McTavish, Q.C., for the appellant.

Hogg, Q.C., for the respondent.

[Sept. 15.

MARTIN *v.* MCMULLEN.

Principal and surety — Guarantee — Floating balance — Ultimate balance — Bankruptcy and insolvency — Dividends.

The plaintiff's testator gave a guarantee in the following form: "In consideration of the goods sold by you on credit to M., and of any further goods which you may sell to M. upon credit during the next twelve months from date, I hereby undertake to guarantee you against all loss in respect of such goods so sold or to be sold, provided I shall not be called on in any event to pay a greater amount than $2,500."

Held [OSLER, J.A., dissenting], that this was a guarantee to secure an ultimate balance and that, M. having made an assignment for the benefit of creditors, the plaintiff could not rank on his estate in respect of the $2,500 paid under the guarantee.

Judgment of the Queen's Bench Division, 20 O.R. 251, reversed, and that of STREET, J., at the trial, 19 O.R. 230, restored.

Gibbons, Q.C., for the appellants.

W. Nesbitt and *A. W. Aytoun-Finlay* for the respondent.

[Sept. 23.

IN RE LOCAL OPTION ACT.

Liquor License Act — Local option — Sale by wholesale — Sale by retail — 53 Vict., c. 56, s. 18 (O.) — 54 Vict., c. 46, s. 1 (O.).

Section 18 of 53 Vict., c. 56 (O.), allowing, under certain conditions, municipalities to pass by-laws for prohibiting the sale of spirituous liquors, is *intra vires* the Ontario Legislature, as is also s. 1 of 54 Vict., c 46, which explains it, but the prohibition can only extend to sale by retail.

A by-law omitting to provide a penalty for its violation is not necessarily bad.

Irving, Q.C., and *J. J. Maclaren*, Q.C., for the Attorney-General for Ontario.

E. R. Cameron, *W. H. Blake*, and *E. E. A. Du Vernet*, *contra.*

HIGH COURT OF JUSTICE.

Chancery Division.

MACMAHON, J.] [Aug. 15.

DUNCAN *v.* CANADIAN PACIFIC RAILWAY.

Railways and railway companies — Horses killed — Property on adjoining premises — 53 Vict., c. 28, s. 2 (D.) — Words — By-law of municipality.

Three horses got upon the defendant's line of railway from adjoining premises, where they had no right to be, and were killed. In an action for damages for their loss,

Held, following *Davis v. Canadian Pacific Railway*, 12 A.R. 724, that the words "under the circumstances it might properly be" in 53 Vict., c. 28, s. 2 (D.), mean "it might lawfully be," and that as the horses were not on the adjoining premises with the consent of the owner or occupant they were not "lawfully" there.

Held, also, that although the owner did not object to their being there, still as there was no by-law of the municipality permitting them to run at large, they could not be held to have been properly there, and the action was dismissed with costs.

Delamere, Q.C., and *Boyce*, for plaintiff.

Watson, Q.C., and *A. MacMurchy*, for defendants.

BOYD, C.] [Oct. 3.

RE UNION FIRE INSURANCE CO.
MCCORD'S CASE.

Winding-up Acts — Contributories — Transfer of shares, object of — Knowledge of by transferor — Transfer of liability.

McC., manager of a company, purchased certain shares from C. for the purpose of cancellation and paid for them with money supplied by the company, but took the transfer to himself as "manager in trust." The shares remained in that position until the company was put into liquidation under the Winding-up Acts, when the Master placed McC. upon the list of contributories as a shareholder.

Held, on an appeal, that knowledge on the part of C. that the transfer was being made to a nominee of the company would have vitiated the transfer, but as there was no evidence of any such knowledge, and as the transfer was made for a consideration paid to the "manager in trust" with no notice of the character in which he was to hold the shares, there was a valid transfer which would relieve the first holder and impose (as against creditors) liability on the transferee.

E. F. B. Johnston, Q.C., for the appeal.

Hilton, contra.

Practice.

Court of Appeal.] [Jan. 14, 1890.

IN RE O'DONOHOE, A SOLICITOR.

Solicitor and client—Præcipe order for taxation of bill and accounting—Jurisdiction of taxing officer under—Inquiry relating to bills not referred.

By an order obtained upon præcipe a certain bill of costs was referred to taxation, and the taxing officer was directed to take an account of all sums of money received by the solicitor of or on account of the applicants.

Under this the taxing officer taxed the bill and took an account of the moneys received by the solicitor, and in so doing inquired into and determined the validity of a disputed agreement in the nature of a compromise relating to some older bills of costs not referred to taxation, but which the solicitor claimed should be allowed at their face value against moneys received by him, and which the applicants claimed should be allowed only at the amount settled by the disputed agreement.

Held, *per* HAGARTY, C.J.O., and BURTON, J.A., that the officer had no jurisdiction under the order to determine the validity of the agreement.

Per OSLER and MACLENNAN, JJ.A., that he had jurisdiction.

The Court being divided, the decisions of ARMOUR, C.J., and the Common Pleas Divisional Court, 12 P.R. 612, were affirmed.

The solicitor, appellant in person.

W. M. Douglas, contra.

MACLENNAN, J.A.] [Sept. 25.

RE NORTH BRUCE DOMINION ELECTION PETITION.

MUIR *v.* MCNEILL.

Election petition—Time for filing—After office hours—Solar time.

Motion by the petitioner to disallow the preliminary objection to the petition filed by the respondent. The objection was that the petition was filed after office hours on the last day for filing it.

M. G. Cameron for the petitioner.

McCarthy, Q.C., for the respondent.

MACLENNAN, J.A. I am of opinion that the preliminary objection must be disallowed. I think the rule as to the keeping the offices of the court open from ten to three, or from ten to four, as the case may be, is merely directory and for the guidance of the officials, and does not forbid them to keep their offices open to a later hour, if they think fit, or if the business requires it. See *Rolker* v. *Fuller*, 10 U.C.Q.B. 477. This petition, therefore, was in time, the office being still open, and the petition having been received by the officer, although it was after three o'clock. . . . I am, moreover, of opinion that the petition was in time in any view of the Act and the rule. It was received by the officer as of that day, and Mr. Cameron, who filed it, swears that it was then not so much as a quarter past three by the public clocks. . . . The officer's act in receiving and filing the petition on that day and granting a certificate of the fact must be upheld, unless displaced by clear and satisfactory evidence. It is common knowledge that the time kept by the public clocks in Toronto is standard time, and that standard time is seventeen and one-half minutes faster than solar time. . . . That being so, the petition was in reality filed before three o'clock, and was in time according to the strictest construction of the rule. There can be no doubt that upon a question like this a party has the right to insist, in the absence of legislation or a rule of court, that solar time should govern; *Curtis* v. *Marsh*, 3 H. and N. 866.

The objection will be disallowed with costs.

Notes of United States Cases.

VERMONT CIRCUIT COURT.

[July 9.

FIRST NATIONAL BANK OF PLATTSBURGH *v.* SOWLES ET AL.

Bank directors—Liability for representations.

Defendants, as directors, during a run on their bank, posted conspicuously in the bank a notice, signed by them, and addressed to the general public, representing the bank to be solvent. Plaintiff saw the notice, and, after consultation with the directors, loaned the bank money, which was lost.

Held, that the notice, not being addressed to the plaintiff, could not entitle him to recover from the directors, under R.L. Vt., s. 983, which provides that no action shall be brought to charge any person upon a representation concerning the credit of another, unless such representation is in writing, and signed by the party to be charged; and the fact that the notice was signed by defendants as directors would prevent a recovery from them individually, even if the notice were a sufficient representation in writing.

Such representation in writing cannot be aided by evidence of additional verbal representations.

Appointments to Office.

QUEEN'S BENCH JUDGES.

Province of Quebec.

Jean Blanchet, of the City of Quebec, in the Province of Quebec, Esquire, one of Her Majesty's Counsel learned in the law; to be a Puisné Judge of the Court of Queen's Bench in and for the Province of Quebec, *vice* the Honorable Ulric Joseph Tessier, resigned.

SUPERIOR COURT JUDGES.

Province of Quebec.

Charles J. Doherty, of the City of Montreal, in the Province of Quebec, Esquire, one of Her Majesty's Counsel learned in the Law; to be a Puisné Judge of the Superior Court in and for the Province of Quebec, *vice* the Honorable Marcus Doherty, resigned.

ADMIRALTY JUDGES.

District of New Brunswick.

The Honorable William Henry Tuck, one of the Justices of the Supreme Court of the Province of New Brunswick, to be a Local Judge in Admiralty of the Exchequer Court in and for the Admiralty District of New Brunswick.

COUNTY COURT JUDGES.

County of Essex.

Michael Andrew McHugh, of the Town of Windsor, in the Province of Ontario, Esquire, and of Osgoode Hall, Barrister-at-Law, to be a Junior Judge of the County Court of the County of Essex, in the Province of Ontario.

Michael Andrew McHugh, Esquire, Junior Judge of the County Court of the County of Essex, in the Province of Ontario; to be a Local Judge of the High Court of Justice for Ontario.

County of St. John, N.B.

Benjamin Lester Peters, of the City of St. John, in the Province of New Brunswick, Esquire, one of Her Majesty's Counsel learned in the law; to be the Judge of the County Court of the County of St. John, in the said Province of New Brunswick, *vice* His Honor Charles Watters, deceased.

REGISTRARS OF DEEDS.

County of Waterloo.

Isaac Master, of the Township of Wilmot, in the County of Waterloo, Esquire, to be Registrar of Deeds in and for the said county of Waterloo, in the room and stead of Dougall McDougall, Esquire, resigned.

County of Welland.

James E. Morin, of the Village of Ridgeway, in the County of Welland, Merchant, to be Registrar of Deeds in and for the said County of Welland, in the room and stead of Dexter D'Everardo, Esquire, deceased.

POLICE MAGISTRATES.

Village of Port Dalhousie.

Robert Patterson, of the Village of Port Dalhousie, in the County of Lincoln, Esquire, to be Police Magistrate in and for the said Village of Port Dalhousie, without salary.

Village of Waterford.

Nelson Green, of the Village of Waterford, in the County of Norfolk, Esquire, to be Police

Magistrate, without salary, in and for the said village of Waterford, in the room and stead of Eugene Hutchinson Long, Esquire, removed to Detroit.

COUNTY ATTORNEYS AND CLERKS OF THE PEACE.

County of Frontenac.

John Lanyon Whiting, of the City of Kingston, in the County of Frontenac, Esquire, Barrister-at-Law, to be County Crown Attorney and Clerk of the Peace, in and for the said county of Frontenac, in the room and stead of Byron Moffatt Britton, Esquire, appointed Referee under the Drainage Act.

County of Middlesex.

Angus Graham, of the Village of Dorchester, in the County of Middlesex, Esquire, M.D., to be an Associate Coroner in and for the said County of Middlesex.

CORONERS.

County of Ontario.

Richard Martin Bateman, of the Village of Pickering, in the County of Ontario, Esquire, M.D., C.M., to be an Associate Coroner in and for the said County of Ontario, in the room and stead of James Rea, Esquire, M.D., resigned.

County of Oxford.

William Ferguson Dickson, of the Town of Ingersoll, in the County of Oxford, Esquire, M.D., to be an Associate-Coroner within and for the said county of Oxford.

County of Simcoe.

John Alfred McGregor, of the Village of Thornton, in the County of Simcoe, Esquire, M.D., to be an Associate-Coroner within and for the said county of Simcoe.

DIVISION COURT CLERKS.

County of Lennox and Addington.

Joseph B. Allison, of the Township of Adolphustown, in the County of Lennox and Addington, Gentleman, to be Clerk of the Third Division Court of the said County of Lennox and Addington, in the room and stead of J. J. Watson, deceased.

DIVISION COURT BAILIFFS.

District of Nipissing.

Charles Lamarche, of the Village of Mattawa, in the District of Nipissing, to be Bailiff of the Third Division Court of the said District of Nipissing, in the room and stead of Wesley Colman, removed.

District of Parry Sound.

James Coff, of the Village of Byng Inlet, in the District of Parry Sound, to be a Bailiff of the First Division Court, at Byng Inlet, in the room and stead of Parpetus Boileau, resigned.

Counties of Stormont, Dundas, and Glengarry.

John Donald McDougald, of the Village of Alexandria, in the County of Glengarry, one of the United Counties of Stormont, Dundas, and Glengarry, to be Bailiff of the Second and Twelfth Division Courts of the said United Counties of Stormont, Dundas, and Glengarry, in the room and stead of Colin A. McLaurin, resigned.

County of Welland.

Charles E. Bradshaw, of the Township of Wainfleet, in the County of Welland, to be Bailiff of the Second Division Court of the said County of Welland, in the room and stead of Elston Priestman, resigned.

COMMISSIONERS FOR TAKING AFFIDAVITS.

County of Lancaster (England).

John Broadfield Parkinson, of the City of Manchester, in the County of Lancaster, England, Gentleman, Solicitor of the Supreme Court, to be a Commissioner for taking affidavits in the said City of Manchester, and in the said County of Lancaster, and not elsewhere, for use in the Courts of Ontario.

Law Students' Department.

EXAMINATION BEFORE TRINITY TERM: 1891.

CALL.

Criminal Law and Evidence.

Examiner: A. W. AYTOUN-FINLAY.

1. Distinguish between a civil injury and a crime.

2. How far is the mere attempt to commit a crime an offence cognisable in law?

3. What are the different degrees or classes of insanity recognised in law?

4. May a wife prosecute her husband, or give evidence against him, upon a prosecution for a personal libel upon herself?

State the reason of your answer.

5. A pickpocket *(a)* puts his hand into the pocket of A., and draws her purse almost out, but it falls back into her pocket; *(b)* he cuts

the loop by which A. is carrying her purse suspended from her hand, and, catching the purse as it falls, runs away with it; *(c)* the loop is cut as in the last case, but the purse falls to the ground and the pickpocket runs away without it.

Of what technical offence is he guilty in each case?

6. What are the circumstances under which the evidence of a person desirous of becoming an approver is receivable?

7. Where witnesses have been ordered out of court, and one of them has, notwithstanding, remained in court, how far is it within the discretion of the judge to permit him to be examined?

8. What are the different ways in which a person may become a competent witness as to the handwriting of another?

9. How far is a solicitor entitled to insist upon privilege regarding communications between himself and his client, the latter not insisting upon their privileged character?

10. To what extent is a protest of a bill of exchange or promissory note evidence of the allegation contained therein?

Equity.

Examiner: A. W. AYTOUN-FINLAY.

1. What is the nature of an action of foreclosure?

2. A., not the sole beneficial owner, pays the premium to keep up a policy of life assurance. In what cases is he entitled to a lien on the policy or its proceeds?

3. A settlor, by a perfect deed, assigns all his personal estate with a power of attorney.

Will this pass a promissory note which is not endorsed and therefore not current?

State reason of your answer.

4. An estate charged with the payment of certain sums of money to be raised by mortgage is devised to trustees.

The trustees find that they can, on much more advantageous terms, sell the estate or a portion of it.

(a) May they sell?

(b) Has the court jurisdiction to permit such sale?

5. A., resident of Ontario, is agent for B., resident in England, under a power of attorney, to collect certain moneys and hold them upon trust.

How far is A. a trustee?

Can he plead the Statute of Limitations in an action brought against him by B.?

Blackstone: Theobold on Wills, the Statute Law and Pleading and Practice.

Examiner: M. G. CAMERON.

1. A. makes a will on the first day of June, 1891, and makes another one on the second of June, 1891, and subsequently makes a codicil to his last will which he refers to in the codicil as having been made on the first day of June, 1891. What effect will the codicil have upon A.'s wills?

2. A testator bequeathes certain property to B. for life, with remainder for her children, C. and D., and by a codicil all gifts in favor of A. are revoked. In what respect, if at all, are the rights of B.'s children affected? Explain.

3. A. after making certain dispositions of his property gives the remainder thereof to B. and makes C. his residuary legatee. What interest will C. take under the will?

4. A. agrees with B. that if a gift be made to him and to C. he will apply it to certain trusts that are defined by them. C. knows nothing whatever of the agreement. B. does not make the gift to A. and C. on the faith of the promise made by A. In what way, if at all, is C. affected by the promise? Explain.

5. When must a defendant serve a notice of his appearance upon the plaintiff's solicitor?

6. A solicitor for the plaintiff enters the action for trial on the 10th of May. On the 11th he gives notice of a trial for the 22nd of May. Is that a good notice? Explain.

7. When may a writ of summons be served substitutionally?

8. Within what time must actions be entered for trial? If the action be not entered in time, what steps should be taken by the party desiring to enter?

9. A. executes an indenture of lease of certain property in favor of B. for five years. The lease is dated 1st April, 1886. The rent reserved thereunder, due the 1st April, 1887, is not paid on 1st May, 1887, and on that day A. commences proceedings to recover possession. What must be shown in order to succeed?

Dart on Vendors and Purchasers.

Examiner: M. G. CAMERON.

1. A., an infant, is the owner of a parcel of land, which he contracts to sell to B. A. rep-

resents to B. that he has attained his majority. B. knows that this is not true, although A. is not aware that he is possessed of this knowledge. Is B. entitled to enforce the contract? Explain.

2. A., the vendor, knowing that a nuisance existed which rendered his house unfit for a residence, employed B. as his agent to dispose of it for him without mentioning to him the nuisance. B. entered into negotiations with C. for the lease of the property, and upon being asked by C. if any objection to the house existed replied in the negative. C. discovered the existence of the nuisance and refused to take the house, whereupon A. brought an action against him for breach of the agreement. Can he succeed? Explain.

3. A., the owner of a parcel of land, offers it for sale by public auction; B., a stranger, attends the sale and, intending to deceive, represents to C., who becomes the purchaser at such sale, that the property is worth $5,000, although he is aware that it is only worth $5,000. Has C. any remedy against B.? If so, what must he prove in order to recover?

4. A. enters into an agreement with B. to sell to him a farm; he describes it as "all my farm of 200 acres," and the price is fixed on that supposition; but it afterwards turns out to be 250 acres. Can A. compel B. to reconvey the farm or pay the difference in the value? Give a reason for your answer.

5. A. purchases from B. a building lot, and enters into restrictive covenants with him; prior to the sale from B. to A., B. had sold to C., D., and E. certain lots, a portion of the same estate, and they had entered into restrictive covenants with B. and *inter se*, and B. had permitted, without interference, material breaches of the covenant to be committed by C. and D.; the same description of covenants were entered into by A.; A. commits a breach of these covenants. Can B. succeed in an action against A. to enforce such covenants? Explain.

Contracts—Common Law.

Examiner: F. J. JOSEPH.

1. A. holds B.'s overdue note for $1,000, bearing ten per cent. interest; A. undertakes to give B. six months longer time to pay it provided he (B.) pays it with the same rate of interest. Is this a binding agreement? Why?

2. Can a manager of an unincorporated society bring an action against a member of the society for overdue fees?

3. Is an agreement to furnish evidence respecting a matter in dispute between third parties on consideration of sharing in the property recovered a binding contract?

4. Is it lawful for a solicitor to undertake a suit upon the understanding that in the event of his being successful he is to have a percentage of the amount recovered; or that he is not to receive any costs if he is unsuccessful?

5. When is it necessary and when is it unnecessary to prove special damage in an action on slander?

6. What must be proved in order to sustain an indictment for robbery?

7. A. directs a constable to arrest B. for larceny. In an action by B. against A. for false imprisonment, what must A. prove to justify the arrest? If A. had caused the arrest to be made under a warrant, what would B. have to prove to obtain a verdict?

8. What are the requirements of an acceptance for honor supra protest?

9. Mention the cases where it is necessary to present a bill for acceptance in order to render liable any party to the bill; and when is such presentation excused?

10. What are the five powers incident to every corporation aggregate, and which of them are unnecessary to a corporation sole?

Common Law, etc.

(Honors)

Examiner: F. J. JOSEPH.

1. A. on behalf of an unknown principal sells goods to B. B. can easily find out whether A. was acting for himself or not. A.'s principal sues B. for the price of the goods. Can B. set-off an overdue note he has of A.'s against the principal's claim?

2. Can a deed be rectified on oral evidence?

3. In what cases does a representation (not fraudulent) which induces a contract, and is not true in fact, affect the validity or operation of a contract?

4. A. purchases 20,000 bushels of wheat from B., for which B. sends him a bill of lading. On delivery A. finds a shortage of 5000 bushels, and in fact 15,000 bushels was all that was shipped. In an action against the master of the vessel, to what extent would the production of the bill of lading be evidence against him?

5. What bills require to be protested? Is there any practical benefit to be derived from protesting bills that do not require to be protested?

6. An executor of an acceptor of a bill verbally promised to pay the holder out of his own estate provided he would forbear to sue for six months. On the faith of this promise the holder did not sue for six months; was the endorser discharged?

7. What is the effect of registering a mechanic's lien on a leasehold or on land mortgaged previous to the registration of the lien?

8. To what extent is a husband liable for the torts of his wife committed before and after marriage?

9. Discuss the following:—A, with a child in her arms, in alighting from a train, while it is in motion, falls, and the child's arm is broken. The parent of the child sues the company. The company pleads the contributory negligence of A.

10. In what respect do bills which affect the revenue differ from other parliamentary bills?

The Canada Law Journal.

VOL. XXVII. NOVEMBER 16, 1891. No. 18.

THE weekly sittings of the First and Tenth Division Courts of the County of York authorized by 54 Vict., c. 15 (Ont.), have now been held three times in each court, and the innovation may, we think, be considered a success. Those having cases in these courts are realizing that time, tide, and His Honor, wait for no man. At a recent sitting, owing to the absence of litigants and their counsel, forty cases were called and disposed of within half an hour, and one hundred and twenty cases in one hundred minutes: a fruitful source of new trials, no doubt; but the effect has been salutary. The dates of the sittings of these Courts for next year, fixed for Tuesdays and Thursdays respectively, have already been tabulated by the energetic deputy clerk of the First Division Court, who, we understand, undertakes that the business of the court will be done with neatness and despatch. The dates as fixed will be given in a later issue.

IN answering the question whether a bank can compel a person who presents a cheque payable to bearer or to the payee to indorse it, *The Banking Law Journal* says:

"While the request is occasionally made by bankers to the holders of bearer cheques that they indorse before payment, and in the case of order cheques it is customary to require indorsement of the payee, there is legal authority for the proposition that the bank has no *right* in either case to require indorsement before payment, and a payee, or holder of a bearer cheque, cannot be compelled to indorse as a pre-requisite to receiving the money. As this is a question which frequently arises in banking practice, something more than this brief statement will be warranted. In the first number of this publication the question was asked if a cheque payable to bearer should be indorsed by the holder, and we then said:

"'A cheque payable to bearer does not require indorsement, of course, for the purpose of transfer. It passes by delivery. Nor is an indorsement by the holder necessary before its payment by the bank in order to entitle the latter to charge the payment to the drawer. It is customary, however, for the paying bank to request the party receiving payment to indorse, as his signature answers the purpose of a receipt, and shows to whom payment has been made. Whether a bank could lawfully refuse payment of such a cheque until the holder had indorsed it is a question which, probably, is not definitely settled. It is the law, although perhaps not universally known among the commercial class, that a creditor is under no legal obligation to give a receipt to his debtor for money

paid. The debtor has no right to withhold payment unless a receipt is given, and a refusal by the creditor to give a receipt constitutes no defence to an action for the debt against the debtor who has tendered the amount on condition that he be given a receipt therefor. If this principle were applied to the case of payment of a cheque payable to bearer, the bank would be held to have no right to require indorsement by the holder before payment; but the latter case stands on a little different footing. In some States a bank is directly liable on a cheque to the cheque holder, and would then stand in the relation of debtor. In others it is under no obligation to the holder, but its duty is solely to the drawer to honor his cheques when presented; and its relation then to the holder would be rather that of agent of the debtor to pay the cheque. In either view it could be urged that as indorsement of a cheque before payment was a reasonable requirement, and contemplated in the contract of the bank with the depositor to honor his cheques, the holder, by accepting the cheque in lieu of money, took it subject to this requirement, and was necessarily bound thereby. However this may be, it is certainly customary for cheques payable to bearer to be indorsed by the holder before payment, and is a requirement which should be complied with.'"

Reference is then made to the case of *Osborn* v. *Gheen*, 3 Central Rep. 762, where the Supreme Court of the District of Columbia held:

"'There is no necessity at all for the legal operation of a payment that the payee should indorse the paper. All that he has to do is to receive the money. The party to whom it is directed is ordered to pay so much money to him. All that the drawer has to do, therefore, is to satisfy himself that when the order is presented the true and proper person is there at hand to receive the payment and to receipt for it. It is true it is common for the payee to indorse in blank at the bank, or for the holder of an instrument to indorse in blank when he receives payment, as a voucher for the payment. But a voucher is not necessary, nor is a receipt necessary, to give validity to a payment. The bank makes the payment of course at its peril, if the payee shall afterwards challenge the payment and say the money was not paid to him but to somebody else. Then it is a mere question of identity as between the payee and the bank; but it does not go to the legal integrity of the instrument.

"'The bank upon whom the note or bill of exchange is drawn is authorized and required to pay the money to the payee, knowing him to be the identical man intended, without any indorsement and without any receipt. Beyond that, a prudent man might well hesitate to indorse a paper which was given him to be paid at the bank for this reason, that if he indorsed it in blank and without qualification, if the bank pleased it could, as we know banks sometimes do, put that paper into circulation again; and if it should get into the hands of a *bonâ fide* holder, he might hold the payee responsible upon his blank indorsement. Therefore a prudent man might properly decline to indorse, in the legal sense of the term, a paper when it was paid to him. He should receipt it as a matter of satisfaction between him and the other; but he should qualify his indorsement by some word or sign or indication that he did not mean to throw the paper into circulation again, but meant to make his name upon it only the representa-

tive of the fact that it had been paid to him and that the functions of the paper had ceased and become entirely extinct.'

"The gist of this discourse, we see, is this: That a bank is under obligation to make payment without any receipt or indorsement, but it is common for the payee to indorse as a voucher; and while under no obligation, the payee should, nevertheless, be accommodating and give a receipt as a matter of satisfaction. He should, however, be careful and qualify his indorsement by some word or sign to show that it was not intended as an indorsement, but merely as a receipt. It would not be prudent for a payee to indorse in blank, for the bank might, instead of jabbing the cheque on the cancelling fork, deliver it over to somebody else with the payee's blank indorsement, and possibly subject him to liability to a *bonâ fide* holder, who from the absence of any indorsement by the bank or other indication on the paper might not know that it had ever been in the bank's possession.

"So far as the argument of *prudence* is concerned, if it is imprudent and risky for a payee to indorse before receiving the money, a large majority of the business world are open to that charge. But waiving that objection—for if it, in fact, had any merit, it could be obviated by a qualified indorsement—bankers are met with the truth that while the needs of business, in the case of order cheques at all events, require indorsement by the payee, the law, as so far announced, does not compel indorsement, but, on the contrary, holds it not obligatory and only to be done as a matter of accommodation, if at all. When the vast amounts of payments of cheques are taken into consideration, and the bother and annoyance to the bank which would result if every holder stood on his legal rights and refused to indorse, the reasonableness of the requirement is apparent. It is reasonable enough for a debtor to ask a receipt from his creditor as evidence of his single payment. But where instead of a single payment a multitude of daily payments are made to all sorts and conditions of men, it becomes absolutely necessary to the proper conduct of the banker's business that he have written evidence of the fact from the party to whom payment has been made; and instead of being a matter of accommodation, it should be a legal right. The view as announced in our previous number would seem proper for any court to adopt, namely, that as indorsement of a cheque before payment was a reasonable requirement, it should be held 'contemplated in the contract of the bank with the depositor to honor his cheques, and that the holder by accepting the cheque in lieu of money took it subject to this requirement and was necessarily bound thereby.' It remains to be seen what view other courts may take of the subject."

A QUESTION OF PRIORITY.

Where a point of law has to be determined, not upon the authority of any decided case, but by the application of general principles, it is surprising to see how judges differ and at what diverse conclusions they arrive.

The case of *Maclennan* v. *Gray*, or *Gray* v. *Coughlin* (as it is called in the

Supreme Court), is not an inapt illustration of this. There the question in controversy was not exactly covered by any decided case, and its solution depended on the application to the particular facts of that case of those principles by which equitable rights are established and enforced; and the result of the prolonged litigation has been that four judges, viz., Boyd, C., Ritchie, C.J., Strong and Fournier, JJ., have taken one view, and six other judges, viz., Hagarty, C.J., Burton, Osler, Street, Gwynne, and Patterson, JJ., have taken another, and that the opinion of the four has prevailed over that of the six—a result which may possibly not be altogether satisfactory to the unsuccessful litigant, although it is of course of itself no reason for imagining that the case has not been well decided.

In a former number (vol. 25, p. 581), we ventured to express an opinion on the merits of the controversy; and in view of the remarkable divergence of opinion the case has given rise to among the judges, it may, perhaps, be worth while to recur to it again. In our previous remarks we stated that we thought the conclusion arrived at by the Ontario Court of Appeal was correct, but since the adverse decision of the Supreme Court (*Gray* v. *Coughlin*, 18 S.C.R. 553) it would, of course, be presumptuous to reiterate that opinion here. At the same time, we think it may not be out of place to point out some aspects of the case which do not appear to us to have been noticed by the Supreme Court.

Before doing so, it may be well to briefly recapitulate the facts upon which the case turns. Richard and John Gray were the owners in fee of a parcel of land which was subject to the dower of Rosanna Gray. Richard and John mortgaged their interest to Coughlin for $700. Rosanna was no party to this mortgage, but she knew of its existence. Subsequently Richard and John mortgaged the property to Maclennan for $4,000, and Rosanna joined in this mortgage as surety and mortgaged her own interest in the land also to Maclennan for this mortgage debt. Maclennan had no notice of Coughlin's mortgage, and acquired priority over it under the Registry Act by the prior registration of his mortgage. The whole of the property mortgaged to Maclennan was sold, and after payment of his mortgage a balance of $1,612 was left. Rosanna's interest was valued at $1525, and the question was whether she was entitled to be paid the value of her interest in priority to the claim of Coughlin under his mortgage.

Ritchie, C.J., on this state of facts, observes: "Under such priority thus obtained over the Coughlin mortgage, Maclennan was entitled to be paid out of the fund in court representing the mortgagor's property in priority to Coughlin, leaving the part which represents the property of Rosanna Gray to be appropriated to her and not to Coughlin. . . . The practical operation of the judgment of the Appellate Court (*i.e.*, the Court of Appeal of Ontario) is to remove the Coughlin mortgage from the property of his mortgagors and place it on the property of Rosanna Gray, which was never mortgaged to him." But we think the premises on which the learned Chief Justice bases his conclusion are open to question. Can it be truly said that the fund in court represented the mortgagors' property? It must be remembered that all that Maclennan's mortgagors had to mortgage, and all that they did, in fact, mortgage to him, was their equity of redemption in Coughlin's mortgage; but Maclennan having re-

ceived a mortgage of only his mortgagors' interest is, by virtue of the Registry Act, enabled to plant his mortgage also on Coughlin's interest; but Coughlin's mortgage, though postponed by force of the Registry Act to that of Maclennan, is nevertheless perfectly valid and binding as against the mortgagors. Can the fund in court then be said to represent Maclennan's mortgagors' interest? And if the fund in court did not really represent the interest of Maclennan's mortgagors, but that interest plus the interest previously mortgaged to Coughlin, then may it not be argued that an equity arises in Coughlin's favor to the extent to which his fund has been applied to pay off Maclennan's debt to rank on the surplus, as will more fully appear as we proceed?

With the learned and elaborate judgment of Mr. Justice Strong, in which the principles of equity applicable to the case are so clearly and fully stated, it is almost impossible to find fault. There is one aspect of the case, however, which neither he nor the Chief Justice appear to us to have noticed; possibly there is nothing in it, and yet it is one that seems to us to afford some ground for the contention of Coughlin.

One of the crucial tests which the learned judge applies to the case is this: Supposing Rosanna had redeemed Maclennan, on what terms would Coughlin be permitted to redeem her? and he says that he would only have the right to redeem the mortgaged property belonging to the principal mortgagors; in other words, in the technical language of conveyancers, the suretyship securities—namely, the dower—would be "at home" in the hands of Rosanna and would therefore be irredeemable by Coughlin, and unless he redeemed by paying off the full amount of Maclennan's debt and interest he would be liable to be foreclosed.

The point, however, which we should like to present in Coughlin's favor is this: This is a case of conflicting equities; on the one hand, Coughlin as a subsequent incumbrancer is entitled, as against Maclennan, to have the securities held by him marshalled; on the other hand, are the equitable rights of the surety. Maclennan is entitled to two funds: the fund mortgaged by the mortgagors and that mortgaged by the surety, Rosanna. He ought not to be allowed to throw the whole of his debt on the former fund to the prejudice of Coughlin. It is, however, conceded that the right of marshalling cannot be allowed to the prejudice of third parties, and it cannot be allowed, therefore, to the prejudice of a surety. But what are the equitable rights of a surety in such a case? Do they extend beyond the right of having the property of his principal applied first towards the payment of the debt for which he is surety? Has he any equity to have any third person's property applied? May not Coughlin be heard to say: "At the time you entered into the contract of suretyship, you knew that all the beneficial interest your principal had in the property mortgaged was subject to my mortgage. By the operation of the Registry Act, Maclennan, it is true, has acquired priority over me, and by that means has been enabled to apply not only the property of his mortgagors, but my property, in payment of his debt. You have an equity, it is true, to have your principal's property applied in discharge of his debt, but as between you and me you have no equity to

apply my property in payment of it. You must be prepared to do equity, and to the extent to which Maclennan's debt, for which you were liable, has been paid out of my fund you must recoup me."

But Strong, J., though he does not assume to deal with this view of the case directly, does so, nevertheless, indirectly, by affirming that the surety under the circumstances of this case is entitled to the benefit of the priority gained by the creditor to as full an extent as if she were a purchaser from him for value, and that as between the surety and the first mortgagee, Coughlin, the surety's equity to be subrogated to the rights of her mortgagee is superior to the right of Coughlin to redeem. But, admitting the right of the surety to be subrogated to the rights of Maclennan, does not that also involve the liability to hold the position of the mortgagee subject to the same equities as affected him, and among others the liability to marshal his securities, so far as it could be done without prejudice to the surety's rights?

But it may be said that to admit of marshalling on any terms would be a prejudice to the surety; but we may ask how can a surety justly say he is prejudiced merely because he is not permitted to have a fund which was not his principal's applied in the payment of the debt for which he is surety? In one sense, a man is prejudiced by not being allowed to pay his debts out of another man's purse; but that is not, we conceive, the kind of prejudice that a surety would be allowed to set up as an answer to a claim to marshal securities.

While the Supreme Court has given full effect to the surety's right of subrogation, it appears to us to have overlooked the correlative right of Coughlin to have the securities of Maclennan marshalled for his benefit.

The effect of the judgment of the Court of Appeal, as we pointed out before, was to place Rosanna, the surety, in exactly the position she may reasonably be supposed to have contemplated when she entered into her contract; but the effect of the judgment of the Supreme Court is to place her in a superior position, by enabling her to ride on the back of Maclennan over the head of Coughlin. Whether the Registry Act, which purports to confine its benefits to subsequent purchasers and mortgagees for value without notice, was designed to have this effect is certainly a fair subject for discussion.

We would also suggest, in conclusion, that when the decision which has been arrived at is based on a legal equity which appears to conflict with the natural equity of a case, it may not be unreasonable to suggest that the principles on which the legal equity is based may perhaps require reconsideration.

COMMENTS ON CURRENT ENGLISH DECISIONS.

The Law Reports for October comprise (1891) 2 Q.B., pp. 513-545; (1891) P., pp. 321-327; and (1891) 3 Ch., pp. 1-81.

BREACH OF PROMISE OF MARRIAGE—CORROBORATION OF PROMISE—OMISSION TO ANSWER LETTERS. EFFECT OF—32 & 33 VICT., C. 68, S. 2—(R.S.O., C. 61, S. 6).

In *Wiedemann* v. *Walpole* (1891), 2 Q.B. 534, it is not very surprising to find that the somewhat curious decision of Pollock, B., that the defendant's mere

omission to answer a letter of the plaintiff asking whether he intended to marry her as he had promised was corroborative evidence that he had in fact made such a promise, was reversed by the Court of Appeal (Lord Esher, M.R., Bowen, and Kay, L.JJ.), who thought that fact alone was not a corroboration of the plaintiff's evidence within the statute 32 & 33 Vict., c. 68, s. 2 (R.S.O., c. 61, s. 6); neither was the fact that the plaintiff was in possession of the defendant's signet ring. The court was of opinion that the not answering a letter differed from the case of a man being, as in *Bessela* v. *Stern*, 2 C.P.D. 265, taxed orally with the promise and making no denial. Whether an omission to answer a letter amounts to an admission of the truth of the statements claimed in it, according to the Court of Appeal, depends on the circumstances under which the letter was written; and unless there is an irresistible inference that the circumstances are such that the refusal to reply amounts to an admission, it will not do so. In connection with this case it may be well to refer to *Yarwood* v. *Hart*, 16 Ont. 23, where the law on this point is also discussed.

LANDLORD AND TENANT—LEASE—BREACH OF COVENANT—FORFEITURE—COMPENSATION—44 & 45 VICT., C. 41, S. 14—(R.S.O., C. 143, S. 11).

Skinner's Co. v. *Knight* (1891), 2 Q.B. 542, was an action of ejectment by landlord against a tenant on an alleged forfeiture of the lease by breach of a covenant to repair. Notice had been given by the plaintiffs to the tenant, under 44 & 45 Vict., c. 41, s. 14 (R.S.O., c. 143, s. 11), and the tenant had, as he claimed, put the premises in repair before the issue of the writ. At the trial before Charles, J., he left two questions: First, whether the premises were out of repair prior to the service of the notice; and second, whether they had been put in repair before the issue of the writ. The jury answered the first question in the affirmative, but disagreed as to the second. On this finding, Charles, J., declined to give the plaintiffs judgment, but gave them leave to re-enter the action for trial. The plaintiffs appealed on the ground that they were entitled to judgment, even though the premises had been repaired before the writ, because the defendant had not paid the plaintiffs the cost of the drawing and serving of the notice under the statute, as part of the compensation required to be made by the statute for the breach of the covenant; but the Court of Appeal (Lord Esher, M.R., and Fry, L.J.) were of opinion that the costs in question were not caused by the breach of covenant, but were occasioned by the fetter which the wisdom of the legislature had imposed on the enforcement of the cause of action arising from that breach.

PROBATE—WILL—CODICILS—REVOCATION—REVIVAL OF FORMER CODICIL BY REFERENCE.

In the goods of Dennis (1891), P. 326, the testator had executed a will in 1867, and two codicils to it in 1869 and 1874. In 1875 he made another will, by which he expressly revoked all previous wills. Subsequently two sisters who were benefited by the codicil of 1874 and the will of 1875 died, and he then made another codicil in 1881, disposing of the property he had left to them, which he described as a codicil to his last will and testament, and which began, "Whereas my two sisters named in my codicil, dated 12th May, 1874, are now dead," etc.,

and the question was whether this had the effect of reviving the codicil of 1874, but Jeune, J., held that it had not that effect.

WILL—FORFEITURE—BANKRUPTCY—ANNULMENT OF BANKRUPTCY, EFFECT OF.

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In re Yates, Bostock v. *D'Eyncourt* (1891), 5 Ch. 53, is a decision of North, J., upon the construction of a will, whereby a testator devised real estate to trustees in fee upon certain trusts for his sons and daughters and the survivor of them; and from and after the death of the survivor, or during the lives of all or any, with their concurrence upon trust to sell the property, and to stand possessed of the proceeds "upon trust for all and every of my said sons and daughters who shall be then living, and the issue of any then dead (such issue standing *in loco parentis)*, share and share alike." The question was, what was the nature of the estate which was thus conferred? North, J., decided that the sons and daughters and the issue of any deceased son or daughter took as tenants in common, but that for wants of words of severance the issue of any deceased son or daughter took their share *inter se* as joint tenants.

JOINT TENANCY—SEVERANCE.

In re Wilks, Child v. *Bulmer* (1891), 3 Ch. 59, it became necessary to consider what acts on the part of a joint tenant are sufficient to create a severance of the joint tenancy. In this case a fund in court stood to the credit of three infant plaintiffs, "as joint tenants." On 19th March, 1890, the eldest of the three obtained his majority, and became entitled to have one-third of the fund paid out to him. On 20th March solicitors were instructed to apply to get his share out of court, and they obtained a summons for payment out returnable on 28th March. On that day the parties attended, and the evidence was complete, but owing to pressure of business the summons was not reached, and was therefore adjourned to 22nd April. In the meantime, on 2nd April, the applicant died; and Stirling, J., held that the proceedings not having been effectual before the death of the applicant, there was no severance of the joint tenancy. According to the learned judge, an act to amount to a severance of a joint tenancy must be of such a character as to preclude the joint tenant from claiming by survivorship any interest in the subject matter of the joint tenancy. The taking out of a summons on which no order was made could not have that effect.

CONTRACT—SALE OF LAND—VENDOR DESCRIBED AS "LANDLORD"—SUBSEQUENT LETTER REFERRING TO CONTRACT AND VENDOR—STATUTE OF FRAUDS, S. 4.

Coombs v. *Wilkes* (1891), 3 Ch. 77, is a decision on that perennial source of profit to the legal profession, the Statute of Frauds; and the point involved was whether or not the vendor was sufficiently described in the contract. The defendant signed a contract agreeing to purchase a parcel of land, and in it stated that he had paid a deposit to "Messrs. R., as agents for the vendor." The document continued: "I hereby agree to pay in the usual way for the tenant right (the landlord to be considered an outgoing tenant, according to the custom of the country)." The vendor's name was not mentioned in the contract and he did not sign it, but it was signed by a clerk of Messrs. R. In a subsequent letter to the vendor's solicitor, the defendant asked that the balance of the purchase money might remain on mortgage, and concluded: "Let me know, and then Mr. Coombs could sign off the deeds . . . I should like a copy of our agreement." It was contended by the plaintiff (the vendor) that the term "landlord" in the original contract sufficiently identified the vendor, and even if it did not the subsequent letter of the defendant cured the defect. Romer, J., however, was of opinion that the term "landlord" was not necessarily referrible to the vendor, and was therefore not a sufficient description of the vendor to satisfy the requirements of the statute; and the letter was not sufficiently connected with the contract by reference to enable it to be used to supplement it. There can, however, be very little doubt that this is only one more case in which the statute has practically been used to effectuate the very purpose it was intended to prevent.

Notes on Exchanges and Legal Scrap Book.

FIRST OFFENCE.—In the report of *Reynold* v. *Phillips*, 13 Ill. Ap. 557, it is stated that when a dog assails a man the man is not bound "to stop and investigate as to the antecedent habits of the dog."

SEWING MACHINE—"HOUSEHOLD FURNITURE."—A sewing machine is included in a general assignment for the benefit of creditors covering all "household furniture."—*Allen* v. *Wallace*, 21 U.S. 49.

INSURABLE INTEREST—FIRE.—A person engaged in moving houses has an insurable interest in the houses which he is moving to the extent of the compensation which he is to receive.—*Planters & Merchants' Ins. Co.* v. *Thurston*, 9 So. Rep. 268 (Ala.).

ACCIDENT INSURANCE—SUNSTROKE.—"Sunstroke or heat prostration" contracted by the decedent in the course of his ordinary duty as a supervising architect is a disease, and does not come within the terms of a policy of insurance against bodily injuries sustained through "external, violent, and accidental means," but expressly excepting "any disease or bodily infirmity."—*Dozier* v. *Fidelity Co.*, 46 Fed. Rep. 446 (Mo.).

TELEGRAPH COMPANIES—MENTAL ANGUISH.—Damages cannot be recovered for mental anguish caused by the negligence of defendant telegraph company's agent in failing to deliver to plaintiff a message informing him of the death of his brother, and the time and place of burial, until after the last train had left by which the plaintiff could have travelled to attend the funeral.—*Western Union Tel. Co.* v. *Rogers*, Miss., 9 South Rep. 823.

BENEFIT OF THE DOUBT.—"I confess I never could understand what the phrase means. There is no benefit of the doubt. Every person is presumed to be innocent until he or she is proved to be guilty. If there is a doubt in the minds of the jury it follows that guilt has not been established, and consequently that the person is, in the eyes of the law, innocent."—*Mr. Montagu Williams* in "*Later Leaves.*"

VALUABLE LEGAL DECISION.—The conclusion we arrive at on discovering the head-note to the case of *Sergeant* v. *Emlin*, 21 Atl. Rep. 662, is that either the bar of Pennsylvania contains some very embryo lawyers, or else that some judge of that State is very anxious to give a judicial opinion about something or

other. In that case the court gravely held that "where two different agents are employed to collect moneys, one of them is not responsible for the defalcation of the other." Such a valuable judicial decision should not be lost sight of.

CARRIERS OF PASSENGERS—SLEEPING CAR COMPANY.—In an action against a sleeping car company for money stolen from a person while asleep, it appeared that the only man kept on the car while it ran from New York to Boston, making eight stops on the way, was a man who acted as conductor, porter, and boot-black. Held that defendant had not exercised due care in protecting its passenger while asleep.—*Carpenter* v. *N.Y., &c., R. Co., N.Y.*, 26 N.E. Rep. 277.

"DEFECTIVE PLANT" INCLUDES A VICIOUS HORSE.—In a recent English case in the Manchester County Court *(Dearn* v. *The Corporation of Manchester)*, the plaintiff sought to recover compensation, under s-s. 1 of the Employers Liability Act (R.S.O. (1887), c. 141, s. 3, s-s. 1), for injuries caused by a vicious horse used by the defendants. It has previously been held in the superior courts that a horse is "plant" within the meaning of the section, and in this case the judge held that a vicious horse was "defective plant," and thereupon gave judgment for the plaintiff. The decision seems consonant with reason, and will no doubt be allowed to stand.

BENEFIT INSURANCE—SIMULTANEOUS DEATH OF INSURED AND BENEFICIARY.—A member of a mutual benefit society named his wife as beneficiary. One of the society's by-laws read: "Should all the beneficiaries named die before the decease of a member and no other or further disposition be made thereof, the benefit shall be paid to the heirs of the deceased member dependent on him or her; and if no person or persons are entitled to receive such benefit, then it shall revert to the relief fund of the said K. & L. of H." The husband and wife perished in the same calamity, being burned to death in a hotel, no one witnessing their death. It was held that the heirs of the member were entitled to the insurance to the exclusion of the administrators of the wife. There being no presumption of survivorship, the court found that the beneficiary named at the time the policy was earned by the death of the husband did not survive him, and was incapable of taking the proceeds of the policy.

MARRIAGE—WHEN COMPLETE.—The clergyman who recently completed the marriage of a drunken man has been found fault with for so doing, but he pleads justification on the ground that "when the outrage occurred the ceremony, so far as regards the actual marriage itself, had already been legally completed by the declaration which pronounces M. & N. to be 'man and wife together.'" We cannot think that the reverend gentleman is technically correct as to the point of the marriage service at which the knot is legally tied. From the judgments

in *Beamish* v. *Beamish*, 9 H.L.C. 274, it would seem that the part of the service at which the marriage becomes knit is "after affiance and troth plighted" between the parties, so that if the ministerial pronouncement should not happen to be given, the marriage would be complete and binding on the parties all the same. In Blunt's "Church Law," however (2nd edit., revised by Sir W. Phillimore, at p. 154), the view is taken that the marriage itself is legally completed by declaration of the priest.—*Law Journal.*

INSURABLE INTEREST—LIFE POLICY.—Two cases at Bolton have drawn attention to the peculiarities of insurance law. The landlord of an hotel in Bolton upon taking it over undertook also to take over and keep a man who was a general hanger-on about the premises. Subsequently an agent of an insurance company called upon the landlord and hinted that the hanger-on's life might be insured in his company. The landlord assented, the policy was granted, and all remiums regularly paid. Two years after the hanger-on died. The landlord ow desired to obtain the value of the policy. The company offered £5 in settlement, but this was refused, and thereupon the landlord instituted proceedings against the company. The magistrates held, however, that he had no insurable interest in the deceased, and, though the company had profited by the premiums paid, they could not be made to pay the amount of the policy. The company claimed that they endeavored to conform to the law; but, looking at the fact that it had received these premiums, this seems hardly creditable. In another insurance case tried in the same place, where a man had insured his brother without his knowledge, and the executors sued for the amount of the policy, they were more successful, and the insurance society had to pay.—*Law Journal.*

WILL—"CHILDREN."—The case of *In re Baynham*, deceased, of which a report will be found in another column (*Ind. Jur.*, vol. xv., p. 413), should serve as a warning to testators, if, indeed, any warning will ever keep some testators from going wrong. The particular moral in this case is not to use lithographed forms of will, and, when you intend to benefit children who are not in the strictest sense your own, to make clear who are the real objects of your bounty. It does not follow that the court will always be able to carry out a testator's wishes although it is quite clear what he really meant. In this case a man of thirty-four married a woman of forty-three, who had children. She bore him no children, and some two or three years after the marriage he made a will on a lithographed form in which were the words "my children." He crossed out the "my" and put "our." It was clear he meant to intimate that he looked upon his wife's children as being as much his as hers. But the court, acting on well-established principles, was obliged to deprive these children of the benefits intended for them by their step-father. It is a pity that in so important a matter as making a will testators will not act on the principle of a cool and self-possessed undergraduate who was in for the Law and History School at Oxford,

and not knowing much law, when asked by the examiner what he should do in such and such complicated circumstances, replied: "I should take a cab, sir, and consult an experienced solicitor."—*Indian Jurist.*

COUNSEL'S IDENTITY.—Sometimes amusing incongruities arise from the closeness with which a counsel in pleading identifies himself with his client. It is a convenient form of speech to refer to yourself as your client. Even judges do not scorn to avail themselves of it in addressing the bar. "Mr. X.," his lordship would say, "are you the engine-driver?" "Are you the lady who was expelled from the public-house for being riotous and disorderly, Mr. Q.?" will be asked by the bench of a peculiarly staid and respectable counsel. And such questions are not resented, the strict distinction seldom being drawn. It takes a little time for an advocate to merge his own identity in that of his client in this way. During a long multiple poinding, in which the claimants were legion, Lord Fraser suddenly turned to O., one of the counsel, and asked brusquely, "Who are you?" The gentleman was sadly taken aback at the directness of the question. He flushed a little, and stammered, "I'm Mr. O., my lord." But this counsel has, through a large practice, learned the way of the courts since those days. He took part in the following colloquy before one of the divisions of the Court of Session last month. He and *Z.* were opposing counsel in a case. "Who are you, Mr. O.?" asked the presiding judge. "I'm Mr. *Z.*'s sister, my lord," was the unblushing statement. "And why are you interested in pressing this?" "I am anxious to get married, my lord," said O., who has really lost all sense of shame and modesty. To the question of an Outer House judge, too, this gentleman of many *aliases* not long since made the startling disclosure, "My lord, I am Charles Macready's bastard son!"—*Journal of Jurisprudence.*

RELIGIOUS EDUCATION OF INFANT.—It is well-settled law that the father who is clothed by law with the right of directing the religious education of his children cannot, even by ante-nuptial contract, bind himself to exercise in a particular way that power which the law gives him for the benefit of his children and not of himself (*Andrews* v. *Salt*, L.R. 8 Chanc. App. 622). In *In re Nevin*, 60 Law J. Rep. Chanc. 542, in addition to an ante-nuptial promise to educate the children of the marriage in the Roman Catholic religion, the father had also allowed the child to be baptized in that faith. The father died in 1886 intestate, the child being then three years old, and on his deathbed he commended his wife and child to a charitable lady of the Protestant faith, who maintained the mother and child in her house, and after the death of the mother, who died intestate in 1889, continued to maintain and educate the child in the Protestant faith. Then followed a story of forcible abduction and rival claims to the guardianship of the infant, involving a dispute whether she should be educated in the Roman Catholic or Protestant faith, which was heard before Mr. Justice Chitty in January and before the Court of Appeal in April last. The court had no

hesitation in deciding against the claim to the guardianship set up by the forcible abductor. Her religious education was a matter of great difficulty; but, acting on the rule laid down in *Titus* v. *Salt*, the court thought the father was at liberty to change his mind and that there had been a sufficient change of mind on the father's part in committing his child to the care of her benefactress, and decided that, in the true interests of the child, she should remain under the care of her Protestant friends and be educated in the Protestant faith.—*Law Journal.*

SI NON E VERO, E BENE TROVATO.—The murder case of *State* v. *Avery*, recently tried in Henry county, Tennessee, is one of the most remarkable in the annals of criminal jurisprudence, and proved the phenomenal genius of the attorney for the accused, a prominent criminal lawyer from Cincinnati, named Wallis. In June, 1887, Charles Ensley, a cousin of Avery, was killed in his room while lying on a lounge, about three o'clock in the afternoon. The weapon used was a small rifle, sending a thirty-two calibre ball through Ensley's brain. No one was in the house at the time but Ensley. An empty rifle was found lying in its rack on the side of the wall, and the bullet fitted the tube. Avery was arrested for the crime, as he was the only living close relation to Ensley, and would have profited by his death to an extent of nearly $100,000. Avery was tried, pleaded not guilty, but was convicted of murder in the first degree and sentenced to be hung. He appealed to the Supreme Court, and engaged Mr. Wallis to defend him. The Supreme Court remanded it back to the Circuit Court on account of technical errors. Two mistrials have been brought about. Now comes the strangest part of the story. The brilliant Wallis struck the keynote to the mystery. In August last he had the rifle loaded and hung on the wall, a white sheet with the form of a man marked on it, and a heavy cut-glass pitcher of water placed on the shelf above. The temperature was ninety-nine degrees in the shade, one of the hottest days in the year. The pitcher of water acted as a sun-glass, and the hot rays of the sun shining through the water were refracted directly on the cartridge-chamber of the rifle. Eight witnesses were in the room, and a few minutes after three o'clock a puff and a report, and the ball struck the outlined form back of the ear, and the theory of circumstantial evidence was exploded. This incident, being seen and sworn to, readily explained itself to the jury. As the sleeping man was lying on the lounge, the direct rays of the sun-glass heated the cartridge, causing it to explode.—*Albany Law Journal.*

DONATIO MORTIS CAUSA.—An interesting and novel point in the law of gifts *causa mortis* was recently decided by the Court of Appeals of New York in the case of *Redden* v. *Thrall*. The donor, who was suffering from hernia, was about to undergo an operation for its cure. The evening before going to the hospital, where the operation was to be performed, he delivered to the donee a tin box, with the declaration that, if he did not return, the box and its contents were to belong to the donee. While undergoing the operation the donor died of heart disease, the

shock from the operation being the immediate cause of the fatal result. On these facts it was contended that, inasmuch as the donor died of a different disease from that from which he apprehended death at the time when the gift was made, the gift could not take effect. But Mr. Justice Earle, delivering the opinion of the court, said: "I am quite sure that no case can be found in which it was decided that death must ensue from the same disease, and not from some other disease existing at the same time, but not known. There is no reason for this additional prerequisite. The rule is that the donor must not recover from the disease from which he then apprehended death. If he recovers, the gift is void; if he does not recover and the gift is not revoked, it becomes effectual. In this case the condition was that if he did not recover from the consequences of the operation and return from the hospital, the gift should take effect. That was a perfectly lawful condition for him as the owner of the property to impose, and no reason can be perceived for refusing to uphold a gift made under such circumstances. A donor may have several diseases, and may, in making a gift, apprehend death from one and not from the others, and shall the gift be invalid if, before he recovers from the disease feared, he die from one of the other diseases? In such a case it might be and generally would be difficult, if not impossible, to tell what share any of the diseases had in causing the death. No medical skill could ordinarily tell that the donor would have succumbed to the disease feared, if the other diseases had not been present. Here the immediate cause of death appeared to be heart disease, and the autopsy did not disclose that there was any connection between the hernia or the operation and the heart disease. But who could tell that the death would have ensued from the heart disease at that particular time but for the operation? No medical skill can tell that the shock from the operation, and the debility and the disturbance caused thereby, did not hasten death; and the death, therefore, in a proper sense may have ensued, and probably did ensue, from both causes. Sound policy requires that the laws regulating gifts *causa mortis* should not be extended, and that the range of such gifts should not be enlarged. We therefore confine our decision to the precise facts of the case, and we go no further than to hold that when a gift is made in the apprehension of death from some disease from which the donor did not recover, and the apparent immediate cause of death was some other disease with which he was afflicted at the same time, the gift becomes effectual."—*Washington Law Reporter.*

ATTORNEY ACQUIRING INTEREST ADVERSE TO CLIENT.—In the case of *Yerkes* v. *Crum* in the Supreme Court of North Dakota, it appeared that while defendant Crum was acting as attorney in a litigation to quiet title to property his client allowed said property to be sold for taxes. It was purchased by a third person, who subsequently assigned the tax certificate to the attorney. The opinions contain much interesting discussion as to whether an attorney can purchase property from his client and acquire title adverse to him under any circumstances. The court divided on the question whether an attorney's title so

acquired is absolutely void and can be assailed by any person, or whether the irregularity so arising can be taken advantage of only by the client. Bartholomew, J., citing *Cunningham* v. *Jones* (37 Kansas, 477), expresses his views as follows: "If the purchase by an attorney of a title to the subject matter of the litigation antagonistic to the title of his client can be assailed only by the client, then the strongest temptation is held out to the attorney to abuse the confidence of the client, to exercise his power and influence over the client to prevent any objection on his part, and it need not be stated that the attorney's efforts in that direction would be successful in a large percentage of cases. To so hold, it seems to me, would be to invite the very results that the law abhors. I think the courts should forever remove this temptation by declaring all such purchases void, by whomsoever attacked."

Corliss, C.J., on the other hand, used this language: "The true reason for the rule inhibiting dealings by the attorney adversely to the interests of his client is the protection of the client. As fraud in such cases might be difficult of proof, and as men may be influenced unconsciously by their personal interests pulling them in the opposite direction, while striving to be loyal to their trusts and while honest in their belief that they are loyal, the law has placed in the hands of the client the power arbitrarily in all cases to thrust aside the ordinary legal effect of the attorney's acts so far as they clash with the client's interests, however fair the transaction may have been. There is no justification for pushing the rule further, thus enabling a stranger to reap profit from an act of the attorney where the same act performed by the client would have barred the stranger's right. Under such a stringent rule, the purchase being a nullity, the client could not, by succeeding to the attorney's interest, secure that paramount right which he could have obtained had he originally made the purchase himself; and thus a rule ordained for the protection of the client is turned against him for the benefit of a stranger."

The decision went off on another ground, but the arguments on this point are forcibly put from the standpoints of the respective writers. See the report of the case in full in 49 Northwestern Reporter 422.—*N.Y. Law Journal.*

JUDGES' CHAMBERS IN ENGLAND.—In Ontario the business of judges' chambers is conducted with the same order and formality as the business in court. A judge holding chambers does not sit in his private room, but in one of the court-rooms; the counsel, solicitors, and students in attendance are called upon in the order in which they sit, and the applications are heard and disposed of with the same regularity as motions in court; the only difference in the mode of holding chambers and court being that in the former case neither the judge nor counsel don any professional costume, and that in chambers both solicitors and clerks are heard; whereas in court both judge and counsel assume their professional costume, and only counsel or suitors in person can be heard to argue cases.

Very different was the mode of holding judges' chambers in England some

thirty years ago. Whether a more civilized method has been adopted of late, we do not know. Of the English method at the time we refer to we do not speak from any lengthened or profound experience, for it is all summed up in one brief visit made at the somewhat juvenile age of fourteen, which, however, has left a vivid and indelible impression behind.

If our recollection serves us right, judges' chambers at that time were held in a dingy building in or near Chancery Lane, that well-known region where the London lawyers were, and probably still are, wont to congregate. Arrived at this building, you ascended a flight of stairs, where you found a comparatively small room, crowded with lawyers and lawyers' clerks. No chairs or sitting accommodation, if we remember aright, were provided. This room, we understood, was the ante-chamber of the judges' room, in which chambers were being held. The motley crowd of lawyers and lawyers' clerks was engaged in what to any spectator unfamiliar with the scene appeared very like an exhibition of lunacy on a large scale; for at intervals they howled out at the top of their voices the names of the cases they were interested in, and, as they were all engaged in the same interesting occupation, the sound which was produced was very much like what one would expect to hear from a pack of loquacious lunatics. "*Brown* v. *Jones*, *Smith* v. *Tompkins*," etc., etc., resounded on all sides. This was the way which attorneys and clerks who had business in chambers had for attracting the attention of those engaged on the opposite side with whom they wished to arrange any preliminaries before being called before the judge; or, on the other hand, the way in which the janitor who guarded the judge's door announced that the next case was ready to be heard. On one side of this room in which this boisterous crowd was assembled, we have a strong impression, stood a man behind a counter, to which a copy of the Bible was chained; not for devout and reverent perusal, we fear, but to be used as a sort of swearing machine, and upon which the custodian behind the counter administered oaths in a perfunctory manner to all and sundry who wished to swear to affidavits of service or what not before him, the form of the oath being somewhat as follows, viz.: "You swear this affidavit is true—s—help you God—a shilling—if you haven't got change, go out and get it."

No doubt when the lawyers and the lawyers' clerks entered the precincts of the judges' room to argue their summonses, etc., due decorum was preserved; but as far as the preliminary stages of approach to the judge are concerned, our English cousins of that day might well have taken a lesson from our mode of doing business. It would be interesting to know whether they still continue to conduct their chamber business in this archaic fashion.

COURT OF SESSION IN SCOTLAND.—*The Law Gazette* extracts the following interesting particulars of this court from the *St. James' Gazette*: "In Scottish judicature the Court of Session fulfils the same functions as the High Court and the Court of Appeal do in England. The building where the judges sit is known as the Parliament House, being the place devoted formerly to the making and

not the interpreting of the laws of the kingdom. The visitor there passes first into the Parliament Hall. The scene is greatly changed from the times when the Morays and the Scotts, the Douglasses and the Homes, with many a noble of lesser degree, met there in hot debate and family feud. The atmosphere is now entirely legal. Round the walls are oil-paintings of men honored in legal legend and lore, and famous in Scottish anecdote. Bust and statue appear at intervals in age-stained marble. Here and there deep chimney-places, and recesses fitted with seats, which are generally occupied by gossiping juniors, while their busier brethren are pacing in conference with their clients up and down the well-worn boards. The wig and gown of the Scots advocate are all but the same as those of the barrister; but his professional garb otherwise is in striking contrast. An evening swallow-tail coat and a high-cut waistcoat, with trousers of some colored tweed, constitute his visible habiliments; and in that costume the advocate is content to parade the streets of his capital. The Scotch advocate has no 'chambers.' He lives and moves and has his professional being in the purlieus of the Parliament House. The client, actual or would-be, is not debarred from finding him at his private abode, and can approach him without the medium of a clerk. It is only the busier counsel at the Scottish bar who finds it necessary to employ such a functionary. He is generally some law-office-trained clerk who can systematize his master's work, 'devil' for him, to a certain extent, and take down in shorthand a dictated opinion or draft. But it is not against professional etiquette for the solicitor to go direct with work or with fees to his counsellor. Up in one of the corridors of the Parliament House are ranged on shelves a series of brief boxes, keyless, bearing on brass plates the names of their owners; and in these any papers for counsel are generally left, unless some urgency demands their delivery at the private address of the advocate. The Court of Session is divided into two 'houses'—the outer and inner. At the end of the Parliament Hall is a lobby out of which on one side open five narrow doors. The five narrow doors lead into as many narrow boxes. In each narrow box is to be found a judge of first instance, one of the Lords Ordinary of the Outer House; the Senior Lord Ordinary occupying the box nearest the Inner House, and the Junior that furthest from it. These lords survey and administer every province of law—Common, Equity, Probate, Divorce, and Admiralty. The pay of a Lord Ordinary is £3,600, and it profiteth him nothing to be promoted to the dignity of a Judge of Appeal in the Inner House, unless he is president of his division. The Inner House consists of two divisions—first and second—of co-ordinate jurisdiction and authority. Each division consists of the apparently awkward number of four judges; but the president's opinion is doubled in the event of any conflict of numbers; he has a casting vote. The Lord President of the Court of Session sits in the first division, and his annual pay is £5,000. The president of the second division is styled the Lord Justice Clerk, and his services are rewarded with £4,800. An appellant may bring his cause before either of these two divisions, as he pleases; being liable, of course, to have it removed from the one list to the other, according to the pressure of business. From either division the appeal lies to the House of Lords."

NOTES PAYABLE AFTER DEATH.—"Like money by the Druids borrow'd, in th' other world to be restor'd." Men usually, in the creation of promissory notes or other commercial obligations, provide a time for their settlement, which, in ordinary expectation, will be reached ere they leave the confines of this earth and journey toward unknown shores. Yet occasionally we find an individual who, be it pleasure to pass life under the shadow of paper obligation, or be it grim humor in postponing his creditor to a time when he may have a journey to the realms of the devil to collect, or be it desire to make a testamentary gift to a friend, using this form instead of a will, sits down and writes his promise to pay an amount of money, payable when he dies or at a certain time after that melancholy event. Of course, such a promise is personally impossible of performance. Death, the intervenor, renders powerless the hand that wrote, to personally keep his promise good. The lifeless clay cannot pay, nor can the spirit which actuated the writing. The promise, if it be enforcible, must be fulfilled by the living representative.

An instrument of this weird class has recently been the subject of consideration by the New York Court of Appeals, and a glimpse of how it has passed muster in the courts may appropriately accompany the abstract elsewhere published.

It will be found, upon looking at the cases which will presently be cited, that the judicial sentiment is unanimous (with the exception of a Scottish case decided a century ago) that the fixing of the time of payment at a period posterior to the life of the promisor, or of another, not only has no effect upon the validity of the instrument as a contract obligation, but none either upon its negotiability. The importance of this latter element lies in its effect upon the right of the holder of such an instrument to recover without proof of consideration—a negotiable instrument importing consideration—and also in its bearing upon the right of an indorsee to recover as upon a negotiable instrument.

In an early case decided in the English Common Pleas in 1743 (*Colehan* v. *Cooke*, Willes 393; Ames, p. 82), a note was given promising to pay an amount to D. or order six weeks after the death of the maker's father. After his death, D. indorsed the note to the plaintiff, who sued upon it. The point made by the defence did not relate to validity of the note as a contract obligation, but to its negotiability. It was insisted against payment that the note was not within the statute of Anne and not indorsable or assignable. Hence the indorsee could not recover. The court overruled this objection, and its judgment was afterwards affirmed in the Court of King's Bench (2 Strange, 1217), where the instrument was said to be negotiable, "for there is no contingency whereby it may never become payable, but it is only uncertain as to the time, which is the case of all bills payable so many days after sight."

In another English case decided a century later (*Roffey* v. *Stapylton*, 10 A. & E. 222; year, 1839) the writing was in this form:

"I promise for myself and executors to pay F. H. or her executors, one year after my death, £300 with legal interest."

This was the subject of dispute simply on the question whether interest should run from date (1808) or from maturity after death (1836). Ordinarily an instru-

ment so drawn carries interest from its date, but it was argued for the executor that in all cases where it had been so held the notes or bills were given for value received. Here, though a consideration must perhaps be presumed, it need not be a pecuniary consideration, or one on which interest may be supposed to run, as a loan. No transactions or dealings between the parties were shown to give probability to a claim of interest during the lifetime of the maker, who certainly could never have himself been called upon to pay any. And it was argued that the instrument looked like a voluntary gift in the nature of a legacy.

Lord Denman, however, said it appeared improbable, if it was the maker's intention that interest should be computed only after his death, he should not have expressed it with more distinctness. In the absence of all particular proof, the note must be presumed to have been given for value, so that interest would be due from the date. If that be doubtful, the instrument ought to be construed most strongly against the maker; and the holder was therefore declared entitled to the larger sum.

Crossing the Atlantic, the American cases have concurred in upholding promissory notes payable after death valid, and not wanting in negotiability for that reason. In an Alabama case (*Conn* v. *Thornton*, Admx., 46 Ala. 587), the instrument in the suit was as follows:

> One day after date I promise to pay, or at my death, W. G. Conn or bearer, the sum of five hundred dollars, for labor done by W. G. Conn for value received this 11th day of December, 1860.
>
> W. R. THORNTON.

The man that wrote this died. His administrator was sued. Objection was made that it was not a promissory note, because not a promise to pay a certain sum of money at a certain time unconditionally; and that it was void for uncertainty. If anything, it was a codicil to Thornton's will; but as such it was void for want of proper execution. The court held the instrument a valid promissory note. The rule was applied that "that which can be made certain is certain," and a promise to pay at, or a limited time after, death of a party was declared valid because the note must inevitably become due at some future time, since all men must die although the exact period is uncertain.

In Connecticut (*Bristol* v. *Warner*, 19 Conn. 7, year 1848) a promise was signed by A. as follows:

> On demand after my decease, I promise to pay to B. or order 850 dollars without interest.

This was held not an instrument of a testamentary character, to be proceeded with in the probate court, but a promissory note, negotiable and irrevocable.

And in Indiana (*Price* v. *Jones*, 105 Ind. 543, year 1885) the instrument was as follows:

> One day after my death, I promise to pay to the order of Nancy M. Jones two thousand dollars, to be paid out of my estate, for value received, without any relief from valuation or appraisement laws, with six per cent. interest from date until paid, and attorney's fees.
>
> BENJAMIN PRICE.

Price's administrator insisted the instrument was an attempt to make a testamentary disposition of property, and was destitute of all legal efficacy. The court

non-concurred in this view, saying: "It is a promise to pay money absolutely and at all events to a person named, and it has, therefore, all the essential features of a promissory note."

In the New York case, which is published elsewhere, the instrument reads:

Thirty days after death I promise to pay to C. fifteen hundred dollars, with interest.

The fact that it is payable after death is held not to affect its character; but the principal discussion relates to the question of enforcibility without proof of consideration by reason of lack of words of negotiability in the instrument. No consideration was proved, and it was contended it could not be presumed unless the instrument was negotiable. This point is decided favorably to the holder under the New York statute, as will be seen by the report of the case.

It remains, before closing, to look at the old Scottish case, where the *post mortem* terms of payment did operate to defeat the instrument. The case, *Stewart* v. *Fullerton*, was decided in the Court of Sessions, Scotland, in January, 1792, and is reported in Morson's Dictionary of Decisions, 1408 (see report also in 1 Ames 92). It was one of an acceptance payable after death. In 1742 the following bill was drawn by Mrs. Mary Stewart, on her brother, John Stewart Murray, of Blackbarony:

Brother.—Pay to me at the first term of Whitsunday or Martinmas after your decease £140 sterling money, value received from your sister, Mary Stewart. To John Murray, of Blackbarony, Esquire.

It was accepted thus:

"Accepts. J. W. Murray."

Mr. Murray survived the date of this bill thirty-seven years. It was contended by his heir in opposition to payment: A bill payable at a term posterior to the death of the grantor is truly a novelty; and in the present case that event did not happen for thirty-seven years after its date. As a document of debt, the bill in question must appear in a light equally extraordinary and dangerous. Should it be sustained to that effect, many new opportunities would arise of committing forgery with impunity. But perhaps it ought rather to be considered as constituting a legacy in a manner not authorized by law.

The answering argument was: As this bill bears value received, there is no evidence of its having been intended to constitute a legacy. It is therefore to be understood as a voucher of debt; to which it is no sufficient objection that the reason of postponing payment till the death of the grantor cannot be clearly shown, especially as the transaction occurred between persons so nearly related.

The court did not view the bill as constituting a legacy. They thought, however that the right which it contained was so anomalous a kind as not to be the proper subject of a bill, and therefore adhered to the Lord Ordinary's interlocutor, "sustaining the objections to the bill."

In this ancient case we see an acceptance equivalent to a promissory note thrown out as a promissory obligation because of the anomalous time of payment expressed. But the modern authorities, it has been shown, are all the other way;

and while this recital of cases cannot, probably, be excused on the groun d o practical utility to the banker, whose practice of short time loans will not permit the tying up of his capital on *post mortem* paper, it neverthelesss has an interesting side, which, it is hoped, will justify its insertion and perusal.—*Banking Law Journal.*

Correspondence.

DOWER IN MORTGAGED ESTATES.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—*Re Pratt* v. *Bunnell*, 21 Ont. 1—The proposition that the measure of a widow's interest in the surplus moneys derived from a sale of mortgaged lands, as to which, for the purposes of the mortgage, she had barred her dower, is one-third of such surplus, irrespective of whether or not the mortgage was given to secure purchase money, receives some countenance from R.S.O., c. 169, s. 50, which provides that in case of a sale by a building society of mortgaged lands, and of there being a surplus of not more than $200, such surplus shall be deemed personal property; *except that* in all such cases the widow of the mortgagor shall be entitled to *a third of such surplus* absolutely in satisfaction of her dower. Assuming the legislature to have a consistent continuous understanding as to what the law is, the section referred to supports the judgment in the above case as a general rule, and not merely in the restricted sense suggested in your article in your issue of 1st October.

Yours, etc.,

Hamilton, Oct. 26, 1891. PETER D. CRERAR.

[We are inclined to think that the statute to which our learned correspondent refers, and which was obviously passed to meet a particular class of cases, does not necessarily afford any ground for concluding that there was any intention to alter or declare the law as to another class of cases to which it does not in terms apply. If we make the assumption which is suggested, then it seems to us that we must conclude that the section was intended to be an exception to the general law, otherwise it would have been unnecessary.—ED. C.L.J.]

DIARY FOR NOVEMBER.

1. Sun.....*23rd Sunday after Trinity.* All Saints' Day
2. Mon.....O'Connor, J., Q.B., died 1887.
3. Tues.....1st Intermediate Examination.
5. Thur.....2nd Intermediate Examination. Sir John Colborne, Lieut.-Governor U.C., 1838.
7. Sat.....Battle of Tippecanoe, 1811.
8. Sun.....*24th Sunday after Trinity.*
9. Mon.....Prince of Wales born, 1841.
10. Tues.....Court of Appeal sits. Solicitors' Exam.
11. Wed.....Barristers' Examination. Annual Fees to Law Society due. Battle of Chrysler's Farm, 1813.
12. Thur.....J. H. Hagarty, 4th C.J. of C.P., 1868. W. B. Richards, 10th C.J. of Q.B., 1868.
13. Fri.....A. Wilson, 5th C.J. of C.P., 1878. J. H. Hagarty, 12th C.J. of Q.B., 1878.
14. Sat.....Falconbridge, J., Q.B.D., 1887.
15. Sun.....*25th Sunday after Trinity.* M. C. Cameron, J., Q.B., 1878.
16. Mon.....Michaelmas Term begins. H.C.J., Q.B.D., and C.P.D. Sittings begin.
19. Thur.....J. D. Armour, 14th C.J. of Q.B., 1887. Thos. Galt, C.J., C.P.D., 1887
21. Sat.....J. Elmsley, 2nd C.J. of Q.B., 1796. Princess Royal born, 1840.
22. Sun.....*26th Sunday after Trinity.*
24. Tues.....Battle of Fort Duquesne, 1758.
25. Wed.....Marquis of Lorne, Governor-General, 1878.
27. Fri.....Frontenac died at Quebec, 1698.
29. Sun.....*1st Sunday in Advent.*
30. Mon.....St. Andrew's Day. Thos. Moss, C.J. of Appeal, 1877. Street, J., Q.B.D., and MacMahon, J., C.P.D., 1887.

Early Notes of Canadian Cases.

EXCHEQUER COURT OF CANADA.

BURBIDGE, J.] [Sept. 17.

THE QUEEN *v.* MALCOLM.

Injurious affection of property by construction of public work—Obstruction of access—Right to compensation—Waiver.

The defendant was the owner of a dwelling-house and property fronting on a public highway. In the construction of a Government railway, the Crown erected a bridge or overhead crossing on a portion of the highway in such a manner as to obstruct access from such highway to defendant's property, which he had theretofore freely enjoyed.

Held, that the defendant was entitled to compensation under the Government Railways Act and the Expropriation Acts.

Beckett v. *The Midland Railway Company*, L.R. 3 C.P. 82, referred to.

The defendant, and a number of other persons interested in the manner in which the crossing was to be made, met the Chief Engineer of Government Railways and talked the matter over with him. The defendant, who does not appear to have taken any active part in the discussion, and the other persons mentioned, wished to have a crossing at rail level, with gates; but the Chief Engineer declining to authorize such gates, it was decided that there should be an overhead crossing with a grade of one in twenty. Subsequently the defendant signed a petition to have the grades increased to one in twelve, as the interference with access to his property would in that way be lessened. The prayer of the petition was not granted.

Held, that by his presence at such meeting the defendant did not waive his right to compensation.

W. F. Parker for plaintiff.

J. J. Ritchie for defendant.

THE QUEEN *v.* BARRY ET AL.

Injurious affection of land—Construction of a railway siding on a sidewalk contiguous thereto—Measure of damages.

Where lands are injuriously affected, no part thereof being taken, the owners are not entitled to compensation under the Government Railways Act, 1881, unless the injury (1) is occasioned by an Act made lawful by the statutory powers exercised; (2) is such an injury as would have sustained an action but for such statutory powers; and (3) is an injury to lands or some right or interest therein, and not a personal injury or an injury to trade.

The construction of a railway siding along the sidewalk contiguous to lands, whereby access to such lands is interfered with and the frontage of the property destroyed for the uses for which it is held (in this case, for sale in building lots), is such an injury thereto as will entitle the owner to compensation.

Quære: Whether the rule that compensation in cases of injurious affection only must be confined to such damages as arise from the construction of the authorized works, and must not be extended to those resulting from the user of such works, is applicable to cases arising under *The Government Railway Act* 1881.

W. F. Parker for suppliant.

Ross, Sedgewick & McKay for respondents.

[Sept. 21.

ARCHIBALD *v.* THE QUEEN.

Contract — Construction — Implied promise — Breach thereof.

The suppliant had a contract to carry Her Majesty's mails along a certain route. In the

construction of a Government railway, the Crown obstructed a highway used by the suppliant in the carriage of such mails and rendered it more difficult and expensive for him to execute his contract. After the contract had been fully performed by both parties, the suppliant sought to maintain an action by petition of right for breach thereof on the ground that there was an implied undertaking on the part of the Crown in making such contract that the Minister of Railways would not so exercise the powers vested in him by statute as to render the execution of the contract by the suppliant more onerous than it would otherwise have been.

Held, that such an undertaking could not be read into the contract by implication.

Ross, Sedgewick & McKay for suppliant.

W. F. Parker for respondent.

THE QUEEN *v.* FISHER.

Interference with public right of navigation—Injunction to restrain—Jurisdiction of Exchequer Court—Right to authorize such interference since the union of the provinces—Position of provincial legislatures with respect thereto—Right of federal authorities to exercise powers created prior to the Union.

(1) An information at the suit of the Attorney-General to obtain an injunction to restrain defendant from doing acts that interfere with and tend to destroy the navigation of a public harbor is a civil and not a criminal proceeding, and the Exchequer Court has concurrent original jurisdiction over the same under 50-51 Vict., c. 16, s. 17 (D.).

(2) A grant from the Crown which derogates from a public right of navigation is to that extent void unless the interference with such navigation is authorized by Act of Parliament.

(3) The provincial legislatures, since the union of the provinces, cannot authorize such an interference.

(4) Wherever by Act of the provincial legislature, passed before the union, authority is given to the Crown to permit an interference with the public right of navigation, and authority is exercisible by the Governor-General and not by the Lieutenant-Governor of the province.

W. F. Parker for plaintiff.

J. A. Jennison for defendant.

[Oct. 14.

DUBÈ *v.* THE QUEEN.

Injury received on Government railway—Negligence—Order for particulars—Practice.

Where in his petition the suppliant alleged in general terms that the injuries he received in an accident on a Government railway in the Province of Quebec resulted from the negligence of the servants of the Crown in charge of the train, and from defects in the construction of the railway, an order was made for the delivery to the respondent of particulars of such negligence and defects.

P. A. Choquette for suppliant.

W. D. Hogg for defendant.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE.

Chancery Division.

STREET, J.] [Aug. 25.

BROOKE ET AL. *v.* THE TORONTO BELT LINE RAILWAY CO.

Railway and railway companies—Expropriation of land—Offer of privileges as compensation—Surveyor's certificate—County judge's jurisdiction—Injunction.

On a motion for an injunction to restrain a railway company from taking possession, under a warrant obtained from a county judge, of certain land different from what was shown on the company's plan deposited under s. 10, s-s. 2, of R.S.O., c. 170,

Held, following *Murphy* v. *The Kingston & Pembroke Railway Co.*, 17 S.C.R. 582, that the land could not be taken, as it was not shown on any plan so deposited.

Held, also, that as the notice given under s-s. 1, s. 20, R.S.O., c. 170, offered certain privileges in addition to cash, and as the land owner was entitled to have her compensation all in cash, there was no proper notice and no proper surveyor's certificate; and as these are at the very foundation of the county judge's authority, he had acted without jurisdiction.

Held, also, that in the case of a limited jurisdiction, such as that of the judge in this case, the facts which give jurisdiction, and without

which the powers given by the Act never arise, must not be absolutely presumed to exist because the judge has acted as if they did; and, if disputable, then the warrant based upon them must stand or fall with them.

Shepley, Q.C., and *W. D. McPherson*, for the motion.

Moss, Q.C., and *Walter Macdonald, contra.*

FERGUSON, J.] [Sept. 30.

RE BOWEY, BOWEY *v.* ARDILL.

Will—Executory devise—Death of parties entitled—Whose heirs should take.

A testator died, leaving his farm to his wife until his daughter should attain the age of twenty-one, when it was to go to her and her heirs; but if she died before attaining twenty-one, it was to go to his wife and her heirs. The widow died before the daughter, and then the daughter died, both deaths taking place before the daughter attained twenty-one.

Held, that the widow took an executory devise which, on her death, descended to her daughter as her heiress-at-law, and that the heirs of the daughter were untolled.

Meredith, Q.C., for the plaintiff.

W. H. Blake for the defendant.

Practice.

BOYD, C.] [Oct. 14.

IN RE SARNIA OIL COMPANY.

Security for costs—Proceeding under Winding-up Act—Powers of referee—R.S.C., c. 129—52 Vict., c. 32, s. 20—Intervening shareholder out of the jurisdiction—Delay in applying for security—Appeal.

An order was made by the court delegating the powers exercisible by the court for the purpose of winding up the company to a referee, pursuant to R.S.C., c. 129, s. 77, as amended by 52 Vict., c. 32, s. 20.

Held, that power was delegated to the referee to order security for costs and to stay proceedings till security should be given by a shareholder resident out of the jurisdiction, who intervened.

Held, also, that the liquidator and others opposing the applications made by the intervening shareholder were not barred of their right to security by not applying till after the original application of the shareholder had been dismissed and appeals taken; but that the security should be limited to the costs on the appeals.

G. W. Marsh for James A. Moore.

Duncan MacMillan for the liquidator.

E. R. Cameron for mortgagees.

BOYD, C.] [October 16.

GENGE *v.* FREEMAN.

Attachment of debts—Judgment debt—Attacking order—No order for payment by garnishee—Sheriff—Return to fi. fa.—Effect of fi. fa. on goods of judgment debtor—Withdrawal of sheriff—Settlement between garnishor and garnishee—Solicitor's lien—Assignment of judgment.

A sheriff's return to a writ of *fi. fa.* goods set forth that he was notified that the amount of the judgment to be executed had been attached by a judgment creditor of the execution creditor, and that the execution debtor (the garnishee) had thereupon satisfied the claim of the garnishor. In fact, there was only an order to attach and a summons to pay over, but no order absolute.

Held, that the return was insufficient in substance, because it showed that the writ remained unexecuted without legal excuse; a garnishee order absolute would have operated as a stay of execution, but not so the attaching order and summons; the duty of the garnishee was to pay the sheriff, advising him at the same time of the existence of the attaching order, and this would have been equivalent to a payment into court.

Where purchasers are not in question, the issue of a writ of execution gives a specific claim to the goods of a judgment debtor, which remains till satisfaction of the debt; and, therefore, the withdrawal of the sheriff did not preclude further action upon the writ.

It appeared that the solicitor for the execution creditor had a lien for his costs upon the judgment obtained by his client, and also an assignment of the judgment, whereof the garnishor and garnishee both had notice.

Held, that the garnishor and garnishee should not have settled the amount garnished between themselves; and that the solicitor should have intervened and had the attaching order set aside by disclosing the assignment to himself of the debt attached.

E. Taylour English for the execution creditor.

Langton, Q.C., for the garnishor.

Middleton for the sheriff.

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ARTICLES OF INTEREST IN CONTEMPORARY JOURNALS.

Deposits in Savings Banks "In Trust." By Van Buren Denslow. *Banking Law Journal*, Oct. 15.
Natural Law and the Behring Sea Question. By S. B. Browning. *Law Quarterly Review*, Oct.
Terminology in Contract. By Sir W. R. Anson. *Ib.*
The American and British Systems of Patent Law. *Ib.*
The Power of the Sovereignty to regulate the conduct of citizens toward each other. *Criminal Law Magazine*, Sept.
A Brief Summary of Equity Jurisdiction. Part vii. *Harvard Law Review*, Oct. 15.
The Nature and Effect of the Certification of a Check. By Robert Thorne. *Columbia Law Times*, Oct.
The Prevention of Unfair Competition in Business. By Rowland Cox. *Harvard Law Review*, Oct.
The Rights of an Unborn Child. By T. F. Uttley. *The Cape Law Journal*, Aug. 15.
The Custody of Lunatics. By W. S. Webber. *Ib.*
Comparative Characteristics of Bills, Notes, and Cheques. By N. Newmark. *Central Law Journal*, Sept. 15.
Barbed Wire. *Law Gazette*, Oct. 22.
The State of the Law Courts. *Strand Magazine.*

Flotsam and Jetsam.

A judge, in pronouncing the death sentence, tenderly observed: "If guilty, you deserve the fate that awaits you; if innocent, it will be a gratification for you to feel that you were hanged without such a crime on your conscience; in either case you will be delivered from a world of care."—*Ex.*

AN Advocate, seeing that there was no longer any use in denying certain charges against his client, suddenly changed his plan of battle in order to arrive at success in another way.

"Well, be it so," he said, "my client is a scoundrel, and the worst liar in the world."

Here he was interrupted by the judge, who remarked, "Brother B——, you are forgetting yourself."—*Ex.*

IN Malta the English let the municipality administer their own laws, and frequently that means that the affair is referred to the clergy. There is a fine church in process of building just without the wall of Valetta, but it progresses very slowly. It is all the work of a single man's hands. He was a stonemason, and he assassinated a brother workman in cold blood. The clergy condemned him to build this church alone and with his own money, or suffer the penalty of the criminal courts. One may see the murderer working out his expiation early and late.—*Green Bag.*

RESTRAINT OF MARRIAGE.—The Hamburg law courts have a nice question to decide. An old gentleman left 20,000 crowns each to his manservant and cook on condition that, if either married, the whole sum should go to the one who remained single. The servants married each other and secured the whole 40,000 crowns. A relative, who disapproves of this cuteness, now seeks to overthrow the will and obtain the return of the money on the ground that by the servants marrying they have defeated the intention of the will. One would imagine that the servants ought to be allowed to keep the money for their ingenuity.—*Law Journal.*

QUEER BEQUESTS.—An eccentric old female of eighty-three years, who was very wealthy, has died in Lyons, leaving behind her a peculiar "last will and testament," which appears to be intended as a posthumous joke at the expense of the members of the medical profession. "In grateful recognition of the intelligent and devoted care of Dr. X.," so runs a clause in the document, "who has enabled me to attain a ripe old age, I bequeath to him everything contained in my *bonheur du jour*." After the death of the estimable testatrix the executors unlocked the article of furniture in question, and found in it, still unopened, unsealed, and uncorked, all the pills and potions prescribed for the deceased by Dr. X. during the past ten years!—*Law Gazette.*

IN a right of way case which recently came before Mr. Justice Kekewich, a local surveyor entertained the court with a brilliant resistance to the sallies of a well-known Chancery barrister, who sometimes attempts to confuse witnesses by filling them with awe at their solemn surroundings. "Remember that you are upon your oath," he was told. "I am not likely to forget it, I think, while I see you in front of me," was the surveyor's very unexpected reply. The learned gentleman tried another question: "Would you continue to state what you have told us if another witness possessing the same opportunities as yourself said the opposite?" Without the least hesitation came the answer: "If another witness possessing the same opportunities as myself were to make a statement contrary to my own, I should know that one of us was wrong." And the local surveyor proudly surveyed the court as his cross-examiner, somewhat crestfallen, set his wig right, and resumed his seat.—*Ex.*

Law Students' Department.

EXAMINATION BEFORE TRINITY TERM: 1891.

CERTIFICATE OF FITNESS.

Taylor on Equity.

Examiner: A. W. AYTOUN-FINLAY.

1. A. has placed a considerable sum of money in the hands of B., with the object of furthering an illegal purpose.

The purpose is accomplished, but B. refuses to account to A. for the proceeds.

What relief, if any, is A. entitled to in equity, and what maxim applies?

2. Under what circumstances and upon what terms will profert of a bond, upon which action is brought, be dispensed with?

3. A compromise of rival claims, of apparently doubtful validity, by A. and B., is entered into by the parties, by which it happens that A. eventually obtains much more than he was entitled to. How far has B. a remedy against A.?

4. What has to be shown to entitle a party to a contract, reduced to writing, to have the contract reformed?

5. A. enters into negotiations with B. for the purchase of a large farm, which B. represents to be "well watered, well wooded, and fertile." A. says that he will not close the negotiations until he has visited the farm, which he does.

He does not go over all of it, but rides to various rising grounds, and expresses himself as well satisfied with the appearance of the farm.

As a matter of fact, much of the farm is a swamp, and the trees, though plentiful, are of a very worthless nature, while a considerable part of the soil is stony and barren.

How far is A. entitled to relief? State reasons of your answer.

6. In the case of a marriage settlement where there is very gross inadequacy in the arrrangement, what relief, if any, will be given in equity?

7. How far may gifts from a client to a solicitor, during the existence of the relation or after its cessation, be supported?

8. An instrument not required by statute to be registered is registered by one of the parties.

How far does this registration create notice by which third parties are affected?

9. A firm endorses a negotiable security in the partnership name. What is the liability of the partners, joint or several, or both?

10. Where a parol contract is entered into in consideration of marriage, how far is the subsequent marriage a sufficient part performance to take the case out of the Statute of Frauds?

Benjamin on Sales.

Examiner: A. W. AYTOUN-FINLAY.

1. A. is induced by B. to sell goods to C., who is at the time, and to the knowledge of B., in insolvent circumstances; B. then obtains the goods from C. for his own benefit. Has A. any remedy against B.? Give reasons for your answer.

2. A. orders goods from B., an agent, to be paid for on delivery; on receiving notice of the arrival of the goods at B.'s warehouse, he goes there and directs C., whom he finds in charge, to put a certain mark on the goods; afterwards, a dispute having arisen as to the stipulated price, A. refuses to take the goods, and action is brought against him by B.'s principal; after action brought, A., at B.'s request, writes in B.'s ledger, at the bottom of a page containing a list of the goods in question, the acknowledgment "Received the above," and signs it. How far is there (*a*) delivery of the goods to, and acceptance of them by, A.; (*b*) a sufficient memorandum to satisfy the Statute of Frauds?

3. A. agrees to sell B. goods to the amount of $300, B. being allowed to deduct therefrom the sum of $78, a debt due by A. to B. How far is the sum of $78 a part payment, sufficient to take the case out of the Statute of Frauds?

4. Plaintiff brings action against A. on a contract in writing, which satisfies the Statute of Frauds; A. sets up as a defence a rescission of the contract by parol agreement. How far is this a sufficient defence to an action for specific performance?

5. A. sells to B. an annuity dependent on the life of C., who had, prior to the transaction, died, without the knowledge of either A. or B.; both have equal means of ascertaining the fact, but B. pays the purchase money to A. Has B. any remedy? Explain.

Hawkins on Wills.

Examiner: M. G. CAMERON.

1. A. by his will makes the following bequest: "I direct that the net proceeds of my estate be equally divided between my children, share and share alike, and at the time of their respectively arriving at the age of twenty-one years." All of the children die under twenty-one. Who take? Explain.

2. The will of A. contains the following clause: "I bequeath to B. when he attains twenty-one the sum of $1000 with interest." B. dies before attaining his majority. Who take? Explain.

3. A testator makes a bequest to the children of A., viz., B., C., and D., when the youngest child, D., attains twenty-one, that is to say, to

B. one-third, to C. one-third, and to D. one-third. B. dies under age and before D. attains her majority. To whom does his share go? Explain.

4. A. by his will makes a gift to B. for life, and after his decease to the next of kin of A. What rule is to be followed in ascertaining who are entitled?

5. A testator by will bequeathes $500 "to my servant John." By codicil to that will he bequeathes another $500 "to my servant John." Is John entitled to both sums? Explain. Would parol evidence be admitted in this case to show what the testator intended?

Armour on Titles, Statute Law, and Pleading and Practice.

Examiner: M. G. CAMERON.

1. A., the owner of a parcel of land, enters into an agreement to sell it to B., who agrees to purchase; but there are no conditions, and no covenant that A. will make a good title. Can B. compel him to do so, although nothing is said in the agreement about it? Explain.

2. A. agreed to sell five acres of land to B.; the abstract, when produced, showed a title to three acres only; it appeared that the remaining two acres had been enclosed by A., and occupied by him for a number of years; the agreement for sale contained a condition that if the purchaser should insist on any objection to the title which the vendor should be unable or unwilling to remove, he should be at liberty to rescind the contract and return the deposit, without interest, costs, or any other compensation. Could A., in this case, take advantage of the condition? If so, why?

3. What must appear in order to induce the court to hold that the taking of possession by a vendee is a waiver of objections to title?

4. From what time should an abstract of title commence, and what should it show?

5. If a defendant, in his memorandum of appearance, gives an illusory or fictitious address, what remedy has the plaintiff?

6. If a defendant does not require the delivery of a statement of claim, what course should he take?

7. Can a person be added as a party defendant to an action under all circumstances, and whether he is or is not interested as to all the relief prayed for in the action?

8. When, if at all, will a defendant in an action be refused permission to avail himself of any set-off or counter-claim that he may have against the plaintiff?

9. What is the rule at present in existence governing the form of pleading?

10. When must the writ of summons in an action brought against an infant be served upon him personally?

Contracts, Mercantile Law.

Examiner: F. J. JOSEPH.

1. In the construction of a written contract, what are the functions of a judge and jury?

2. A. writes to B., "I shall not pay you; the debt is barred by the Statute of Limitations." Will this revive the remedy of B. against A. to recover a debt barred by the statute?

3. A. falsely represents to B. that certain grain which B. has in his (A.'s) elevator has been injured, and that its value is greatly depreciated. On the faith of this representation B. sells the grain to A. at a price much below its value. Is this contract between B. and A. void? What would be the effect had A., after concluding his bargain with B., sold the grain to C.?

4. A seller shows the buyer a list of prices; the buyer agrees to purchase on the condition of a reduction of 10 per cent. from such prices for cash. The buyer writes an order for certain of the articles, not specifying angthing as to price. Is this a binding contract?

5. Can a contract entered into by a person under arrest, part of the condition being that he shall be released, be enforced against him?

6. Is an undisclosed principal liable to a vendor for contracts made by his agent? Is there any exception to the rule?

7. Is a carrier bound to charge all his customers equally?

8. A. purchases a house from B., which is insured. The policy is not assigned to A. In the event of the destruction of the house, what are A.'s rights against the Insurance Company?

9. Is the right to participate in profits conclusive of the existence of a partnership? Explain.

10. A. sells goods to B. which are not fully paid for. A. holds the goods as a lien. B. has an overdue note of A.'s for an amount equal to the price of the goods sold by A. to B. Can B. compel A. to hand over the goods?

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THE Torrens System of land registration has certainly taken kindly to the Prairie Province, and the latter to it. *The Western Law Times* in its last issue gives a short statistical summary of the results since its introduction on the 1st of July, 1885, when the Winnipeg office, originally the only one, and having jurisdiction over the whole province, was opened. In March, 1889, Land Titles Districts were established, and there now remain only six registration divisions under the old system. In the five years succeeding the inauguration of the new system, 7971 applications were received. There were 7653 registrations by way of transfer or mortgage and 10994 certificates issued. The expenditure during that period was more than one hundred thousand dollars, but the receipts were considerably over that sum ; and the offices are now not only self-sustaining, but yield a revenue to the Government. Our contemporary estimates the value of the land brought under the system at considerably over fifteen million dollars. It is stated to be the intention of the present Government, as soon as it has been recouped for the expenditure of past years, to reduce the fees, thus making the offices self-sustaining only.

WE believe in economy. We think, however, that there is a line beyond which economy is unnecessary, and we have an instance in point which immediately concerns the profession. Until about the year 1884 the Law Society considered, naturally enough, that it was proper and essential that the profession should be supplied with the reports of the Supreme Court of Canada, as well as with those of this Province. About that year the society became imbued with a desire to economize—some have, indeed, called it parsimony—and in consequence thereof, the supply of Supreme Court Reports was cut off; the profession apparently being given to understand that if they should require the decisions of the court of last resort in this country, they must not expect their annual fees to cover the expense of the issue. The old arrangement between the Dominion Government and the Law Society enabled the latter to obtain copies for the profession at the low price of one dollar per volume. As the reports of the Supreme Court now cover so wide a field, every member of the profession must continually turn to them for the latest and, usually, the ultimate decision on the point in question. True economy is avoidance of unnecessary expense. This expense is, we think, fully warranted. The newly-elected benchers have inaugurated numerous reforms and curtailed needless expenses; let them curtail more—if, indeed, it be necessary—in order to have in hand the funds required to provide all barristers and solicitors whose fees are not in arrear

with a copy of the decisions of the highest court in this Dominion. Some of the benchers, we know, agree with us in this. We would urge on such to move in this matter, and we feel sure that they will be supported by the majority of the profession throughout the Province.

THE library at Osgoode Hall, considered to be one of the best law libraries on this continent, has been in the past unfortunate in not having had in charge of it a librarian who was able to devote his entire time to the important requirements of a position necessitating continued and arduous work on any one who would conscientiously endeavor to fulfil its duties. The new blood infused this year into the benchers of the Law Society considered rightly that the work of librarian and of secretary of the society could not be efficiently performed by one man, and relieved the late librarian of his duties as such, thus enabling him to devote his entire time to his other offices of secretary and sub-treasurer. The courteous and obliging assistant librarian was retained, and applications were received for the important position, in which a man of varied attainments, and general as well as technical knowledge, was so urgently needed. We are aware that many names were before the committee appointed to deal with the applications, and some of them of men with more or less claim on the society, as well as the names of persons eminently qualified to undertake a work which long since should have emerged from one of mere routine. In view of this, the selection of Mr. W. G. Eakins may well be considered a recognized tribute to that gentleman's ability. It does not detract from the merit of the appointment when we know that he is a member of some years' standing of the society which has chosen him, and that he is also "conversant with men and manners much" by his connection with a leading newspaper of this city. A distinguished course at the University of Toronto, embracing, as it did, several departments of university work, will be a guarantee of scholarly attainments; and we desire, in passing, to congratulate both the committee and the newly-chosen incumbent on the appointment.

THE old saying that a lawyer cannot draw his own will, of which we have a remarkable instance, among many others, in the case of Lord St. Leonards, is again borne out by the decision of the New York Court of Appeals in the matter of the will of the well-known lawyer, Samuel J. Tilden. His will appeared to express in explicit terms the desire of the testator to establish a free library in the city of New York, but owing to the indefiniteness in the object of the trust it was held void.

The facts shortly were that the testator gave the residue of his estate to his executors and trustees in trust, to obtain an act of incorporation of an institution to be known as the "Tilden Trust," "with capacity to establish and maintain a free library and reading room in the city of New York, and to promote such scientific and educational objects as my said executors and trustees may more particularly designate." By the will it was also provided that if such an

institution should be incorporated satisfactorily to them within the life of the survivor of two specified lives in being, the executors and trustees were authorized to organize the corporation, and convey to its use the residue of the estate, or so much as they should deem expedient. The will further provided that in case said institution should not be so incorporated, or if for any reason the executors and trustees should deem it expedient so to convey or apply said fund, or any part thereof, to the said institution, then they were authorized to apply the same "to such charitable, educational and scientific purposes" as in their judgment would render the same "most widely and substantially beneficial to the interests of mankind." The trustees duly obtained the charter and conveyed to the institution the residuary estate. It was held by a closely divided court that the trust was void for want of a certain designated beneficiary, for uncertainty and indefiniteness in the objects thereof, and for excess of discretion in the trustees.

In the recent case of *Read* v. *Williams*, 35 N.Y.S.R. 909, 26 N.E. 730, a bequest of the residue of the estate after the same should be converted into money "to such charitable institutions . . . as my executors, by and with the advice of" a person named, "shall choose and designate," was held to be void, both as a trust and as a power in trust, for want of a designated beneficiary or class of beneficiaries.

Bishop Hurst, of the Methodist Episcopal Church, having probably these decisions in mind, does not believe in taking any chances of a bequest being lost, and asks intending donors to the American University at Washington to present their gifts in their lifetime rather than bequeath them by will, and gives as his reason that "the risk is too great and the issues too serious in these days to entrust too confidently one's benevolent plans to the doubtful mercies of discontented heirs and industrious attorneys."

COMMENTS ON CURRENT ENGLISH DECISIONS.

The Law Reports for November comprise (1891) 2 Q.B., pp. 545-582; (1891) P., pp. 325-348; (1891) 3 Ch., pp. 81-241; and (1891) A.C., pp. 297-498.

CRIMINAL LAW—ILLEGAL EVIDENCE RECEIVED—INTIMIDATION—TRADE UNION THREAT OF STRIKE UNLESS EMPLOYER CEASED TO EMPLOY NON-UNION MEN—CONSPIRACY AND PROTECTION OF PROPERTY ACT, 1875 (38 & 39 VICT., C. 86), S. 7, S-S. 1—(R.S.C., C. 173, S. 12, S-S. 1).

Connor v. *Kent* (1891), 2 Q.B. 545, was a case stated by a recorder for the opinion of the court in a prosecution for intimidation under the conspiracy and protection of the Property Act, 1875 (38 & 39 Vict., c. 86), s. 7 (R.S.C., c. 173, s. 12). It appeared by the case stated that the court had received and acted upon the evidence of the accused, and the court therefore quashed the conviction on the simple ground that this evidence had been improperly received. *Gibson* v. *Lawson* is another case included in this report, and is also a decision

upon a case stated by magistrates upon a prosecution under the same statute. Section 7 provides that "every person who with a view to compel any other person to abstain from doing, or to do any act which such other person has a legal right to do, or abstain from doing, wrongfully and without legal authority, (1) uses violence to or intimidates such other person, or his wife, or his children, or injures his property . . . shall, on conviction, be liable," etc. In this case the appellant and respondent were workmen in the same yard and were members of different trade unions. The trade union to which the respondent belonged resolved to strike if the appellant did not leave the union to which he belonged and join the respondent's union. The respondent informed the appellant of this resolve without using any threat of violence to the appellant's person or property in case of refusal. The appellant refused to join the respondent's union and was dismissed by his employer in order to avoid a strike; but the appellant swore that "he was afraid, because of what the respondent had said, that he would lose his work and could not obtain employment anywhere where the respondent's society predominated numerically over his own society." The court (Lord Coleridge, C.J., Mathew, Cave, A. L. Smith, and Charles, JJ.) were agreed that no case of intimidation within the statute had been made out. With regard to the cases of *Reg.* v. *Devitt*, 10 Cox C.C. 592; and *Reg.* v. *Bunn*, 12 Cox C.C. 316, in which Lord Bramwell and Lord Esher are reported to have held that the statutes on the subject of trade unions had in no way altered or interfered with the common law, and that strikes and combinations expressly legalized by statute may yet be treated as indictable conspiracies at common law, the court considered such a proposition as "contrary to good sense and elementary principle," and they cast over such indefensible decisions the ever-ready mantle of judicial charity by adding, "and the reports, therefore, cannot be correct." *Curran* v. *Treleaven*, a decision on a cognate subject, is also included in this report. In this case the appellant was a secretary of a trade union and the respondent was a coal merchant, and in order to prevent the respondent from employing non-union men the appellant and two other secretaries of trade unions informed him that if he did not cease to do so they would call off the members of their respective unions. After a meeting of the unions, at which it was resolved to adopt this course, the appellant and the other secretaries, in the presence of the respondent, who was invited to attend, made the following statement to the respondent's workmen and others who were assembled: "Inasmuch as Mr. Treleaven still insists on employing non-union men, we, your officials, call upon all union men to leave their work. Use no violence; use no immoderate language; but quietly cease to work and go home." The union men, in consequence, ceased to work, and it was held by the court that there was no evidence of any intimidation by the appellant within the meaning of the statute. The court repudiate the idea that, because the result of a strike may be detrimental to an employer, therefore the promotion of it is an indictable offence at common law. Where there is no malice in fact, and the strike is promoted to benefit the workmen, even though the employer be injured, yet the agreement to strike under such circumstances is neither illegal nor actionable.

EASEMENT—RIGHT OF WAY—MORTGAGE OF SERVIENT TENEMENT WITHOUT RESERVATION OF RIGHT—IMPLIED RESERVATION—WILL—DEVISE—IMPLIED GRANT.

Taws v. *Knowles* (1891), 2 Q.B. 564, was an action brought to recover damages for interruption of an alleged right of way. Both plaintiff and defendant claimed title under a testatrix who had been owner of both the dominant and servient tenement. The dominant tenement she had occupied herself, and the way in question was over a passage, which led from the house she occupied, through the servient tenement (which she let to a tenant), to a street. This was not a way of necessity, but was used by her from time to time. In 1882 the testatrix had mortgaged the servient tenement without reserving the right of way over it. She subsequently died, and by her will devised the dominant tenement to the plaintiff's predecessor in title and the servient tenement to the defendant. The will contained no reference to the right of way. The defendant redeemed the mortgage and took a conveyance from the mortgagee. Under these circumstances, A. L. Smith and Grantham, JJ., held that, as no right of way was reserved by the mortgage and as the way was not a way of necessity, all right of way through the passage was extinguished by the mortgage; and that consequently the right of way had not passed to the plaintiff's predecessor in title under the will, and they dismissed the action. Upon appeal, the court (Lindley, Fry, and Lopes, L.JJ.) refused to decide whether or not the way did or did not pass under the will subject to the mortgage; but they affirmed the decision on the ground that as both plaintiff and defendant were volunteers, the plaintiff had no equity to deprive the defendant of the larger estate he had acquired by the conveyance from the mortgagee; but, though dismissing the appeal, they did so subject to the right (if any) of the plaintiff to redeem the mortgage. *Phillips* v. *Low*, 92 L.T. 26, is another case recently decided by Chitty, J., bearing on the questions involved in this case.

TRUSTEE—MORTGAGE BY CESTUI QUE TRUST—MISREPRESENTATION, LIABILITY OF TRUSTEE FOR—PERSON CONTRACTING WITH C.Q.T.—INCUMBRANCES—NOTICE OF INCUMBRANCE TO TRUSTEE—FRAUD.

Low v. *Bouverie* (1891), 3 Ch. 82, was an action in which an incumbrancer on the interest of a *cestui que trust* sought to make the trustee liable for misrepresenting the amount of the prior incumbrances on the interest of the *cestui que trust* of which notice had been given to him (the trustee). There was no doubt that the misrepresentation had been made in fact, but it was admitted that it had been made without fraud, and that it was due to negligence or forgetfulness. The representation was made in answer to a letter from the plaintiff's solicitors stating, as a reason for the inquiry, that their clients "were doing business with" the *cestui que trust*, but not stating that any advance was intended to be made on the strength of the information obtained from the trustee. The defendant stated certain incumbrances, but not all of which notice had been given. But he did not state that those mentioned were all. Under these circumstances, as there was no actual fraud, the Court of Appeal (Lindley, Bowen, and Kay, L.JJ.) held that under *Derry* v. *Peek*, 14 App. Cas. 337, the trustee was

not liable on the ground of deceit, neither could he be made liable on the ground of breach of duty, warranty, or estoppel, and they reversed the decision of North, J., who had given judgment against the defendant. The Court of Appeal discuss very fully how far trustees are under any obligation to furnish such information, and come to the conclusion that they are under no such obligation, either to their *cestui que trust* himself or to any one claiming under him. They also discuss the question as to when an estoppel arises by virtue of a representation, and point out that it is only where a party can claim that the facts shall be held to be true as they are represented that that doctrine can be invoked. In the present case, to hold the defendant to the representation that there were the incumbrances which he had mentioned, would not assist the plaintiffs, because he had not made the negative statement that there were no others. The cases of *Moffat* v. *Bank U.C.*, 5 Gr. 374; *Cook* v. *R. C. Bank*, 20 G. 1, and *Dominion Savings and Investment Society* v. *Kittridge*, 23 Gr. 631, may be referred to as showing how an estoppel may arise by virtue of a representation. The result of the law as laid down by the Court of Appeal is (1) that a trustee is under no obligation to give any information at all as to incumbrances on the interest of his *cestui que trust;* (2) that if he does give information he is not liable for any negligent misrepresentation made by him, provided he has not made it fraudulently, with intention to deceive; nor is he bound by it as a warranty where there is no contract nor intention to contract; (3) that no estoppel arises unless the statement made is so clear and unambiguous as to prevent the person making it from setting up the true state of facts; *e.g.*, if the defendant in this case had said there were no incumbrances on the interest of his *cestui que trust* except those he mentioned, he might have been estopped from setting up the contrary; but the defendant's letters being ambiguous and being consistent with the fact that the incumbrances he mentioned were all he knew of, or remembered, no estoppel could arise. Estoppel, as Bowen, L.J., explains, is merely a rule of evidence, and no action for damages can be founded on it, and an estoppel can only arise where the language is clear and unambiguous; and, as Kay, LJ., observes, the doctrine of estoppel does not apply to an action of deceit because "in such an action the plaintiff relies, not on the truth of the statement, but upon its falsehood; and he is bound to prove not only that the representation was untrue, but also that it was made fraudulently."

COSTS—"FULL COSTS," MEANING OF.

In *Avery* v. *Wood* (1891), 3 Ch. 115, the Court of Appeal determined that where an action is dismissed with "full costs" pursuant to the terms of a statute authorizing "full costs" to be awarded, the costs are to be taxed in the ordinary way between party and party. See 14 P.R. 407, 411.

REAL PROPERTY LIMITATION ACT, 1874 (37 & 38 VICT., C. 57), S. 8 (R.S.O., C. 111, S. 23.)—SUIT TO RECOVER LEGACY—EXPRESS TRUST—IMPLIED TRUST.

In re Davis, Evans v. *Moore* (1891), 3 Ch. 119, is a decision which we have already referred to, (see *ante* p. 514). As we have already stated, the Court of

Appeal (Lindley, Fry, and Lopes, L.JJ.) decided that in a suit against an executor for a legacy the executor may set up the Statute of Limitations as a bar to its recovery, notwithstanding he is an implied trustee of it; this being, as we have already observed, contrary to the ruling of the Ontario Court of Appeal in *Cameron* v. *Campbell*, 7 A.R. 361. In a late case, *Strader* v. *Harkness* (not yet reported), Boyd, C. we believe has also held that a defence of the Statute of Limitations is a good defence to an action against an executor for a legacy when there is no express trust.

WILL—CONSTRUCTION—"SHARES," MEANING OF—DEBENTURE STOCK.

In re Bodman, Bodman v. *Bodman* (1891), 3 Ch. 135, the sole point for adjudication was whether under a bequest of all a testator's "shares" in a public company his debenture stock would pass. The testator at the time of his will had ten £10 shares and £200 of debenture stock in the company, and Chitty, J., held that the debenture stock did not pass, because by the Companies' Act there was a material difference between the ordinary proprietary shares and debenture stock of a company, the holders of the latter not being members of the company and having no right to vote at any meeting of the company, and being entitled merely to a fixed rate of interest whatever the net profits might be. A *dictum* of James, L.J., in *Attree* v. *Howe*, 9 Ch.D. 649, that debenture stock "is of the same nature as other stock of a company," is to be understood, not as an absolute and unqualified statement, but merely in relation to the point decided in that case.

SOLICITOR'S LIEN—TITLE DEEDS HELD BY MORTGAGEE—COSTS OF MORTGAGEE'S SOLICITOR—PAYMENT OF MORTGAGE—MORTGAGOR'S RIGHT TO HIS DEEDS.

In re Llewellin (1891), 3 Ch. 145. Chitty, J., reaffirms a well-established principle in regard to the law governing a solicitor's lien, viz., that a solicitor's right of lien on deeds is limited to the interest of his client in the deeds; and if his client is bound to deliver up the deeds, his solicitor cannot retain them for costs due by his client. In this case the deeds in question were held by the solicitor as solicitor for a mortgagee; the mortgagor had paid off the mortgage and obtained a release from the mortgagee, and claimed to have the title deeds delivered up to him. The solicitor refused to deliver up the deeds, claiming a lien thereon for costs due to him by the mortgagee for costs of an attempted sale of the mortgaged property incurred on the instructions of the mortgagee. Chitty, J., ordered the solicitor to deliver up the deeds and pay the costs of the application. It may be well to notice that the order was made on a summary application in the matter of the solicitor; and but for the fact that the deeds had originally come to the solicitor's hands as solicitor for the mortgagor, it would have been necessary to bring an action to recover them.

WILL—CONTINGENT REMAINDER—EXECUTORY DEVISE.

Dean v. *Dean* (1891), 3 Ch. 150, is a decision of Chitty, J., on one of those knotty points of real property, which arose upon the construction of a will, the

point being whether a limitation in a will was to be construed as creating a contingent remainder or an executory devise. The devise in question was to A. for life, and from and after the decease of A. to the use of such child or children of A. living at his decease, and such issue then living of the child or children of A. then deceased, as either before or after the death of A. should attain the age of twenty-one or die under that age leaving issue. Here it is obvious that if the devise were to be construed as a contingent remainder on the death of A. leaving an infant child or children, or any infant child or children of a deceased child, the devise would fail, because the limitation in favor of the remainderman could not take effect immediately on the determination of the life estate; whereas, if construed as an executory devise, the limitation would take effect on the children attaining twenty-one. The case was complicated by there being conflicting decisions. Chitty, J., following *Re Lechmere* v. *Lloyd*, 18 Ch.D. 524, and *Miles* v. *Jarvis*, 24 Ch.D. 633, in preference to *Brackenbury* v. *Gibbons*, 2 Ch.D. 417, decided that the limitation must be regarded as an executory devise. It may be that in Ontario the question discussed in this case is not of much importance, having regard to the provisions of R.S.O., c. 100, s. 29.

TRADE UNION, POWER OF, TO ACQUIRE AND HOLD LAND—DEVISE TO A. FOR HIS LIFE AND THE LIFE OF HIS HEIR, EFFECT OF—DEVISE TO A SOCIETY NOT AUTHORIZED TO TAKE BY DEVISE.

In re Amos, Carrier v. *Price* (1891), 3 Ch. 159, two interesting points of real property law are decided by North, J., also arising upon the construction of a will, dated in 1871, whereby a testator devised and bequeathed freehold and leasehold land to a devisee for his life and the life of his heir, "after which it becomes the property of the Boiler Makers and Iron Ship Builders' Society." The first problem to be solved was, What was the legal effect of a devise to a man for life and for the life of his heir? It was argued that the testator had attempted to give an estate unknown to the law, that an estate *pour autre vie* must be for the life of a person ascertained during the tenant's own life. But North, J., held that the devise was legally valid, and that the effect of it was to give to the devisee an estate for his own life and for the life of the person who should be ascertained to be his heir at his decease. The next problem was as to the effect of the gift in remainder to the society, which was a trade union society, not a corporate body, but empowered by statute to hold and acquire land "by purchase." It was contended that "purchase" means "acquire otherwise than by descent or escheat," but North, J., was of opinion that the statute simply empowered the society to acquire land for money and did not enable the society to acquire land by devise, and therefore that the devise to the society was void; and as to the freehold, the land vested in the heir at law: and as to the leasehold, it passed to the next of kin.

EQUITABLE CONTINGENT REMAINDER—FAILURE OF LIFE ESTATE—40 & 41 VICT., C. 33—(R.S.O., C 100, S. 29).

In re Freme, Freme v. *Logan* (1891), 3 Ch. 167, is another decision on the law relating to contingent remainders. The question was whether a contingent

remainder of an equity of redemption created prior to 40 & 41 Vict., c. 33, which after that act had become clothed with the legal estate, was defeated by the failure of the prior life estate before the remainder could take effect in possession. North, J., held that as an equitable contingent remainder is not subject to the legal rule that makes a legal contingent remainder liable to be destroyed by the failure of the prior particular estate, so the fact that it had subsequently become clothed with the legal estate could not make it subject to the legal rule, and therefore that the limitation was valid and subsisting, notwithstanding the failure of the particular estate. See R.S.O., c. 100, s. 29. This act, we may observe, though somewhat on the lines of the English act, is very differently worded.

SETTLEMENT—CONSTRUCTION—COVENANT TO SETTLE AFTER ACQUIRED PROPERTY.

In re Crawshay, Walker v. *Crawshay* (1891), 3 Ch. 176, a somewhat curious point was raised. The defendant on his marriage in 1881 had agreed to settle any property he might thereafter acquire under the will of his mother, who was then alive. She died in 1889, and by her will left him a life interest in a sum of money, but subject to a clause that if he alienated or attempted to alienate his interest in the fund his interest should cease and the subsequent trusts be accelerated. The trustees desired the opinion of the court whether the execution of the agreement for a settlement had worked a forfeiture under the will. North, J., came to the conclusion that the property in question was not within the covenant, and therefore that there had been no forfeiture.

WILL—BEQUEST TO A CLASS—VESTED OR CONTINGENT GIFT—PERIOD OF ASCERTAINMENT OF CLASS—REMOTENESS.

In re Mervin, Mervin v. *Crossman* (1891), 3 Ch. 197, the rule against perpetuities receives a further illustration. A testator by his will, made in 1848, gave his residuary real and personal estate upon trust for sale, etc.; and, after giving certain annuities, directed the trustees to hold the investments and income thereof, "upon trust to pay and divide the same equally between the children of my son, viz. (naming five), and any other children who may hereafter be born, as and when they shall respectively attain twenty-five years," and the testator gave his trustees power, "in the meantime, to pay and apply the whole or any part of the remainder of the increase of the investments for the maintenance and education of such grandchildren during their minority"; and also to pay and apply for the benefit or advancement of his said grandchildren, or any of them, "any part not exceeding one-half of the capital to which they or he may be entitled expectant on their, his, or her attaining twenty-five years." At the testator's death in 1879 his son had five children living, three were subsequently born, and all were still living. His eldest child attained twenty-five in January, 1890. Stirling, J., held that none of the grandchildren took vested interests, but that the gift was a gift to a class, which must be ascertained when the first of the grandchildren attained twenty-five; and that the gift was therefore void for remoteness,

because at the death of the testator none of the children of the son had attained twenty-five. "All the children then living might have died without attaining twenty-five, so that it might have happened that the class to take was not ascertained until after the expiration of a life or lives in being and twenty-one years afterwards, that is, beyond the limit allowed by the rule against perpetuities."

ADMINISTRATION—DEBT OWED TO ESTATE BY BENEFICIARY BARRED BY STATUTE OF LIMITATIONS—DEBTS OWING BY BENEFICIARIES, WHEN TO BE BROUGHT INTO ACCOUNT—SPECIFIC GIFTS.

In re Akerman, Akerman v. *Akerman* (1891), 3 Ch. 212, a testator gave shares of his residuary real and personal estate to three of his sons. The sons owed the testator's estate for moneys advanced by the testator to them in his lifetime, but the right of action for the debt was barred by the Statute of Limitations. The point Kekewich, J., was called on to decide was whether in making the division of the residue these debts were to be brought into account as against the respective shares of the debtors, and he determined that they must, together with 4% interest thereon from the testator's death. Another point was also raised as to certain specific devises and bequests of freehold and leasehold estates to the three sons, and he held that they were respectively entitled to their specific gifts without first making good what, if anything, was due in respect of their indebtedness to the testator's estate.

STATUTORY RIGHT TO COMMIT DAMAGE—COMPENSATION—FAILURE OF SPECIAL STATUTORY TRIBUNAL—JURISDICTION OF HIGH COURT TO ASSESS COMPENSATION.

In *Bentley* v. *Manchester, Sheffield & L. Ry. Co* (1891), 3 Ch. 222, the defendants had acquired a statutory right to commit damage to the plaintiff's property. The statute bound the defendants to make compensation for the damage, to be assessed by a tribunal specially constituted; that tribunal had ceased to exist, and the defendants claimed that the plaintiff was without remedy; but Romer, J., held that under such circumstances the High Court has jurisdiction to assess the compensation.

TRUSTEE—BREACH OF TRUST—RESIDUARY PERSONAL ESTATE HELD ON TRUST—STATUTE OF LIMITATIONS—TRUSTEE ACT, 1888 (51 & 52 VICT., C. 59) S. 8—(54 VICT., C. 19, S. 13 (O.)).

In re Swain, Swain v. *Bringeman* (1891), 3 Ch. 233, is a decision of Romer, J., under the Trustee Act, 1888, s. 8, the provisions of which were adopted in Ontario at the last session (54 Vict., c. 19, s. 13 (O.)). The action was brought by a *cestui que trust* under a will of a testator who died in 1872 against a surviving executor and trustee for a breach of trust, and to compel him to make good an alleged loss of £1800 occasioned thereby. Under the will the trustees and executors were directed to realize the residuary personalty, and pay the income, with the rents of the realty, to the testator's widow during widowhood, she maintaining and educating her family. The real estate was devised to them in trust to sell when the youngest son attained twenty-one, and a specified sum was then directed to be invested for the widow and the income paid to her during life or widowhood, and on her death or marriage the sum so to be invested was to be divided

among the testator's daughters. Instead of realizing the residuary personalty, the executors and trustees allowed the widow and children to live on the testator's farm, which the trustees worked, and maintained the widow and children out of the profits until 1882, when the youngest son attained twenty-one, and the residuary personalty and realty were then sold. The present action was commenced by one of the sons in 1890, the widow being still alive. Romer, J. held that the action was not one for a legacy to which the lapse of twelve years could be pleaded under 37 & 38 Vict., c. 57, s. 8 (R.S.O., c. 111, s. 23), but an action for a breach of trust to which "no existing Statute of Limitations applied" before *the Trustee Act of* 1888 (54 Vict., c. 19 (O)) was passed; and that under s. 8 of that act (s. 13 of Ontario Act) the lapse of six years was a good defence in bar of the action. We may note that the Ontario statute does not apply except to actions commenced after 1st January, 1892.

Notes on Exchanges and Legal Scrap Book.

JOINT WILL—VALIDITY.—A joint will executed by two brothers, revocable at the will of either, is valid. *Hill* v. *Harding*, Ky., 17 S.W. Rep. 199.

WITNESS—EVIDENCE.—When a witness has been in a position to know the facts, but his memory has grown dim, what he thinks he recollects is, if relevant, admissible in evidence in connection with the other testimony. *Harris* v. *Nations* (Tex.), 15 S.W. 262.

EXECUTORY CONTRACT—WASTE.—The maxim that equity regards that as done which in good conscience ought to be done will not be applied in favor of one in possession of land under an executory contract of purchase, so as to enable him to waste or destroy the property or impair the vendor's security before the contract is performed. *Miller* v. *Waddingham* (Cal.) 11 L.R.A., 510; 25 Pac., 688.

CRIMINAL LAW—HOMICIDE—MANSLAUGHTER.—One who goes to another's house, where the inmates are quiet and inoffensive, and, with pistol in hand, originates a difficulty, and undertakes to intimidate them, and by his conduct causes a person to shoot him, is guilty of voluntary manslaughter, if after being shot he pursues and kills such person. *Main* v. *Commonwealth*, Ky., 17 S.W. Rep. 206.

MARRIED WOMEN—SERVICES.—A married woman may recover in her own right for services rendered by her in caring for another than her husband, though the person cared for resides in the house with herself and husband as a member of the family, but not for board and provisions without proving that the husband did not furnish them. *Stamp* v. *Franklin* (Sup. Ct.), 35 N.Y.S.R., 828; 12 N.Y. Supp., 391.

SALE—BUILDING MATERIALS.—The words "building materials" in a contract of sale of material to be removed from a certain lot of ground do not include fixtures and appliances contained in the building for supplying heat, for lighting by gas, and for the distribution of water.—*Labbé* v. *Francis*, Montreal. L.R., 7 S.C.

CHINESE EXCLUSION ACT—DEPORTATION.—Where a Chinese person has been convicted of being unlawfully in the United States, and the evidence shows that he entered the United States from Canada, after having been in that country for a time, he must be returned to Canada, under the act which provides that such person shall be removed to "the country whence he came." *In re Mah Wong Gee*, U.S.D.C. (Vt.), 47 Fed. Rep. 433.

PROFESSIONAL CIPHER.—The practice has often been exposed of sending to young lawyers, for collection, claims which have been given up by older practitioners and even the most indefatigable dunning agencies. It betokens a touching faith in the power of mere youth on the part of the creditors, but the custom is rather hard on the young attorney. We have often thought that some private professional cipher might be agreed on which, if found imprinted on a venerable but not quite outlawed promissory note, would save any attorney into whose hands it came from squandering energy over it.—*N. Y. Law Journal.*

MARRIAGE LAWS.—THE CANADA LAW JOURNAL for June 1st contains an interesting letter from a resident in the North West Territories, which declares that: "An important question which is likely to engage the attention of jurists in the near future is the legitimacy of so-called marriages solemnized after the Indian customs of our aborigines." With the natives, it seems, "it is a marriage in good faith; but "the wily white man does not so regard it," and is constantly "attempting to repudiate his so-called wife and legally contract another marriage." This state of things probably is not unlike the state of things in Burmah, where the union of an Englishman and a Burmese woman is (or used to be) of very frequent occurrence. The validity of marriages of the kind was fully considered in *Bethell* v. *Hildyard*, L.R., 38 Ch. Div., 220, where a marriage had taken place in Bechuana land between an Englishman and a Bechuana woman, in Bechuana fashion. This marriage was pronounced to be invadid, on the ground that a marriage of the kind, performed in a foreign country, is not a valid marriage according to the law of England unless it be formed on the same basis as marriages throughout Christendom, and be in its essence "the voluntary union for life of one man and one woman to the exclusion of all others."—*Indian Jurist.*

TAVERN-KEEPER'S VOLUNTARY SUBMISSION TO A POPULAR VOTE.—*The Law Journal* relates that "a very odd, probably unique, proceeding has just been been witnessed in a Westmoreland village, near Kendal. Most businesses.

including that of a publican, are carried on primarily for the benefit of the owner, and it is indeed an edifying spectacle to find an innkeeper appealing to his fellow-parishioners as to whether they think his inn a benefit or a nuisance to the neighborhood. Yet this has happened in the case of an ancient tavern at Burneside. There was many years ago a beershop in Drury Lane where they refused to serve any customer with more than one drink. The proprietors of the Anglers' Arms at Burneside for many years past, deeming themselves physicians or moralists as well as publicans, appear to have exercised a like discretion, and often declined to serve applicants with liquor. The present owners have even gone a step further, and a week or two ago deliberately invited the opinion of the ratepayers by the issue of voting-papers, and undertook, if a substantial majority should be in favor of the discontinuance of the business, to close the house for the purposes of alcoholic refreshment." On the vote being taken it was found that the people had decided that the house should remain open.

"WHILE THERE IS LIFE THERE'S HOPE" is a motto which doubtless did not occur to the plaintiff in the insurance case tried recently in New York. The proceedings had a most sensational termination, the plaintiff's husband, upon whose supposed death she was claiming money from an insurance society, suddenly appearing in court. Put very briefly, these were the facts of this remarkable case. John H. Gately disappeared in 1888. On July 21st, 1890, a body was found which was identified by Gately's widow as that of her husband. The remains were buried by the widow, who then claimed $3,200 from the insurance company, her husband being insured for that amount. The company refused payment on the ground that the evidence of death was insufficient. Mrs. Gately then brought an action, which was tried one day last week. It was, however, speedily brought to a close by Gately himself walking into court. His appearance caused a great sensation, and a verdict for the insurance company was given by the jury without leaving their seats. The most sanguine litigant could not hope to win with so much against her.—*Law Gazette.*

Reviews and Notices of Books.

A Guide to Criminal Law. By Charles Thwaites. Third edition, London: Geo. Barber, 1891.

This work is intended for the use of students reading for the Bar Examination. The fact that it has reached its third edition shows that it has been found useful by students. We have compared the general sketch of criminal law in this book with our criminal statutes, and find little difference except in the matter of punishments, and of recent English statutes not yet adopted in Canada. The student for the final who has read his Harris carefully and concludes with a perusal of the general sketch and the questions and answers in this little manual need have no fear of the paper on criminal law.

Proceedings of Law Societies.

LAW SOCIETY OF UPPER CANADA.

EASTER TERM, 1891.

The following is a *résumé* of the proceedings of Convocation during the above Term :—

The following gentlemen were called to the Bar, viz.:

May 18th.—Thomas Milton Higgins, Robert McKay, William James Fleury, John Fosberry Orde, George Wilkie, John Alexander Ferguson, Samuel King, James Edmund Jones, Honore Chatelain, Robert B. Henderson, Norman Mackenzie, Thomas Alexander Gibson, John Albert Taylor, Alexander Grant Mackay, Edward Francis Blake, Edward Gerald Fitzgerald, Frederick Forsyth Pardee, Henry Langford, Robert Alexander Montgomery, William Cameron Smith, Gordon Waldron, D'Arcy Fenton, Hugh Macdonald, Percy Allan Malcolmson, David Mackenzie, William Havelock Garvey, Patrick Kernan Halpin, Charles Edwin Oles, Matthew Wilkins.

May 19th.—Frank Stewart Mearns, James Albert McMullen, Horatio Clarence Boultbee, William Hardy Murray.

June 6th.—James Hales, D. Grant, Edward Mortimer, Alexander Grant McLean, Harold Jamieson, Robert Moore Noble.

June 30th.—Norman Phelps Buckingham.

The following gentlemen were granted Certificates of Fitness as Solicitors, viz.:

May 18th.—John Fosberry Orde, John Albert Taylor, Harper Armstrong, Frederick Forsyth Pardee, Edward Gerald Fitzgerald, D. Fenton, Ashman Bridgeman, William Havelock Garvey, Robert B. Henderson, Thomas William Scandrett, Edward Lindsay Middleton, Matthew Ford Muir, Joseph Braun Fischer.

May 19th.—James Duncan Lamont, William Hardy Murray, Norman Mackenzie, William James Fleury, James Albert McMullen, D. W. Baxter, Newton Wesley Rowell, William Cameron Smith.

May 29th.—Samuel King.

June 6th.—Robert Alexander Montgomery, George Wilkie, Thomas Alexander Gibson, Horatio Clarence Boultbee, Gordon Waldron, James Hales, Harold Jamieson.

June 30th.—Arthur Crowe, Thomas Milton Higgins, William Frederick Hull, David Mackenzie, Henry Langford, Norman Phelps Buckingham.

The following gentlemen passed the Second Intermediate Examination, viz.:

T. H. Lennox, J. H. Rodd, L. P. Duff, W. D. Card, G. F. Blair, W. J. McCammon, E. Donald, H. A. Stewart, E. G. Rykert, N. Jeffrey, I. B. Irwin, L. B. C. Livingstone, J. R. Milne, H. A. Lavall, F. W. Gladman, H. E. McKee, P. S. Lampman, M. O. Street, G. G. Duncan.

The following gentlemen passed the First Intermediate Examination, viz.:

James T. Scott, John McCready, Edward W. Drew, P. A. LaRose, A. Nugent, Hugh Matheson, Charles O'Connor, J. F. McMaster, James K McLennan, G. S. Bowie, T. H. Grant, J. M. Farrell, A. E. Garrett, W. Stamworth, F. M. Brown, Allan McLennan, G. G. Thrasher.

The following gentlemen were entered as Students-at-Law and Articled Clerks, viz.:

Graduates.—John Douglas Kennedy, Arthur Breden Cunningham, Charles Theophilus Des Brissay, George Drewry, Daniel P. O'Connell, Geo. F. Peterson, Francis G. Kirkpatrick, David Allen Burgess, David Wesley Jameson, George Arthur Bell, Alfred William Briggs, Walter Ellis Buckingham, George Bennett Burson, Henry Zane Churchill Cockburn, Thomas David Dockeray, Duncan Donald, Alexander Fasken, George Howard Ferguson, Hugh McEwen, John Milton Godfrey, William Heard Harris, Arthur Thomas Kirkpatrick, Gordon Laing, William James Moran, Patrick J. O'Rourke, Henry C. Pope, Hugh Edward Rose, John Sale, John Manning Scott, Russell M. Thomson, Uriah Morley Wilson, Henry Montgomery Wood, George Alexander M. Young, C. R. McKeown.

Matriculants.—J. L. Killoran, G. H. Thompson, E. J. Butler, E. J. Deacon, G. F. Kelleher, O. E. Klein, A. Langlois, J. E. McPherson, D. A. McDonald, J. E. McMullen, J. W. Payne, J. A. Supple, F. W. Tiffin, J. P. White, P. A. Manning, M. J. O'Reilly, M. A. Secord, H. H. Wood, O. A. Langley, H. H. Bicknell, W. A. McCord, I. H. Addison.

Convocation met.

Present.—Messrs. McCarthy, Moss, Guthrie, Strathy, Barwick, McDougall, Hoskin, Irving, Riddell, Mackelcan, Hardy, Shepley, Idington, Fraser, S. H. Blake, Ritchie, Britton, Bruce, Teetzel, Kerr, Martin, and Aylesworth.

The Secretary declared and reported the following gentlemen to be elected Benchers of the Society for the ensuing five years, viz.:

Messrs. W. R. Meredith, Charles Moss, A. J. Christie, Colin Macdougall, James Magee, Donald Guthrie, B. B. Osler, Edward Martin, Christopher Robinson, B. M. Britton, Arthur S. Hardy, John Hoskin, Christopher F. Fraser, H. H. Strathy, F. MacKelcan, D'Alton McCarthy, John Bell, George F. Shepley, Alex. Bruce, J. V. Teetzel, A. B. Aylesworth, George H. Watson, Z. A. Lash, J. K. Kerr, Walter Barwick, Æmilius Irving, Charles H. Ritchie, William Douglas, W. R. Riddell, and John Idington.

On motion of Mr. Hoskin, seconded by Mr. Moss, the Honorable Edward Blake was unanimously elected Treasurer for the ensuing year.

The minutes of the last meeting were read and approved.

Ordered, that leave be granted to Mr. Hoskin to introduce rule to amend Rule 30.

Ordered, that the petition of Miss Clara Brett Martin for admission as a Student-at-Law be referred to a Special Committee composed of Messrs. S. H. Blake, D. Guthrie, Idington, Meredith, Moss, Riddell, Shepley, Martin, and McCarthy.

The Secretary reported that he had been served on the 15th of April with notice of an application to reinstate Mr. J. G. Currie on the Roll of Solicitors,

and that the solicitor of the Society had appeared, according to the exigency of the notice, and had the matter enlarged till after the first day of Convocation.

Ordered, that the matter be referred to the Discipline Committee, and that the solicitor be instructed to obtain further enlargements if necessary.

Ordered, that the consideration of Mr. Justice Rose's letter, enclosing a letter from C. W. Yomex to W. R. Riddell alleging improper conduct on the part of a solicitor, do stand till the Saturday next after the appointment of the Standing Committees.

Ordered, that the word "nine" in Rule 30 be struck out and the word "twelve" substituted therefor.

Ordered, that Messrs. Bruce, Hoskin, Irving, Kerr, Strathy, McCarthy, Shepley, Martin, Moss, Lash, and Riddell, be a Special Committee to strike the Standing Committees to be elected in accordance with Rule 29.

Mr. Hoskin, on behalf of Mr. Irving and himself, presented their Report on the application of Mr. G. M. Gardner to the Provincial Legislature for an act to admit the said Gardner to practice in Ontario as a solicitor as follows:

(1) That a bill with this object in view was introduced at the late session, and that your Committee had a lengthy correspondence with the Attorney-General, pointing out the reason why an act to the above effect should not pass.

(2) That ultimately the bill was withdrawn.

(3) That this is the third time that the said Gardner has made application for the purpose aforesaid to the Legislature, and your Committee would suggest that Convocation should appoint a committee to prepare between this and the next meeting of the Legislature such matter as will enable them to oppose any further application of the said Gardner to the Legislature.

Ordered, that Mr. Barwick be added to the above Committee.

Ordered, that the report of the Discipline Committee on Mr. Armstrong's complaint against Mr. W. G. Fisher, a solicitor, be considered on 23rd May instant.

Ordered, that the letter of W. H. Vandersmissen, Librarian, Toronto University, in reference to presenting the University with a complete set of Reports from the time when they became the property of the Society, be referred to the Reporting Committee to report how far the request can be complied with and the whole cost involved.

The Report of the Legal Education Committee on the Primary Examinations was received and read as follows:

The following candidates for admission were entered on the books of the Society as Students of the Graduate Class, viz.:

(1) John Douglas Kennedy, Arthur Breden Cunningham, Charles Theophilus Des Brissay, George Drewry, Daniel Patrick O'Connell, George Frederick Peterson, and Francis Grant Kirkpatrick.

(2) That the following candidates were entered as Students-at-Law of the Matriculant Class, viz.:

James Lawrence Killoran, George Herbert Thompson, Edward James Butler, Ernest John Deacon, George Frederick Kelleher, Otto Edward Klein, Alexander Langlois, James Edgar Macpherson, Donald Alexander McDonald, James E. McMullen, John Webber Payne, Joseph Alfred Supple, Frederick William Tiffin, John Percival White, Percy Alexander Manning, Michael Joseph O'Reilly, Melvin A. Secord, Herbert Harold Wood, Oliver Aylmer Langley, Hugh Harry Bicknell, Willian Arthur McCord.

Ordered, that the above-named gentlemen be entered as members of the Law Society.

Ordered, that leave of absence be extended to Mr. Grasett to 1st September next, and that the Finance Committee see that his duties are properly performed in the meantime, with power to make such arrangements as may be necessary in the premises.

Ordered, that leave of absence be granted to Mr. Esten, during vacation from first July to first September, and his salary to be continued as usual, and that his salary up to 31st August be paid in advance if he shall so desire.

Ordered, that the Finance Committee arrange for any temporary assistance required by reason of the absence of Mr. Esten.

The Report of the Special Committee on Standing Committees was read and adopted.

Tuesday, May 19th.

Convocation met.

Present—Messrs. Riddell, Ritchie, Irving, Moss, Martin, Strathy, Barwick, McDougall, Shepley, McCarthy, Meredith, Teetzel, Kerr, Aylesworth, Watson.

The minutes of the last meeting were read and approved.

Mr. Moss, from the Legal Education Committee, reported the regulations made for the examinations in the Law School and under the former system for the present term.

Ordered, that Charles R. McKeown be admitted as a graduate as of Easter Term, 1891, and that his time run from the first day of this term.

The Legal Education Committee reported respecting the acts relating to the call to the Ontario Bar of Ministers of Justice of Canada not already members thereof, and to the admission as solicitors of barristers of certain standing.

The Committee suggest the framing of proper regulations for the carrying into effect the provisions of the act in regard to the admission of barristers as solicitors.

The Report was read and adopted.

Ordered, that so much thereof as relates to framing rules and regulations as to the admission of barristers as solicitors be referred to the Legal Education Committee.

The Report of the Examiners on the First and Second Intermediate Examination was received and adopted.

The Report of the Secretary on the standing of the candidates was received and read.

Ordered, that the following gentlemen be allowed their First Intermediate Examination, viz.:

J. T. Scott, J. J. McCready, E. W. Drew, P. A. C. LaRose, A. Nugent, H. Matheson, Charles O'Connor, J. F. McMaster, J. K. McLennan, G. S. Bowie, T. H. Grant, J. M. Farrell, A. E. Garrett, W. Stamworth, F. M. Brown, A. McLennan, G. G. Thrasher.

Ordered that the following gentlemen be allowed their Second Intermediate Examination, viz.:

T. H. Lennox, J. H. Rodd, L. P. Duff, W. D. Card, G. F. Blair, W. J. McCammon, E. Donald, H. A. Stewart, E. G. Rykert, N. Jeffrey, I. B. Irwin, L. B. C. Livingstone, J. R. Milne, H. A. Lavall, F. W. Gladman, P. S. Lampman, M. O. Street, G. G. Duncan, H. E. McKee.

The Report of the Principal of the Law School on the work of the School during the past term was laid on the table.

The Secretary laid before Convocation the order of the High Court of Justice, dated the third day of March, A.D. 1891, in the matter of Henry Auber Mackelcan, a solicitor, ordering that the said Henry Auber Mackelcan be struck off all existing rolls of attorneys and solicitors, and off the roll of the Supreme Court, and that he be not entered on any future list of the Supreme Court that may be made up, and the certificate of the Registrar of the Chancery Division of the High Court of Justice, certifying that, in pursuance of the said order, the name of the said Henry Auber Mackelcan was on the tenth day of March, A.D. 1891, by the Assistant-Registrar, struck off all existing rolls of attorneys and solicitors of the said High Court of Justice in open court, pursuant to the direction of the Honorable Mr. Justice Ferguson, then presiding.

Ordered, that the said Henry Auber Mackelcan be suspended from the Society, and that the Secretary do give the notice required by Rule 123.

Mr. Martin gives notice that he will move to have the question of Law School fees payable by students referred to the Finance Committee.

The Secretary read a letter from the Registrar of the University of Toronto with regard to the reception of a Committee of the Senate of the University, with a view to securing to graduates in the Faculty of Arts the benefits of the provisions in the rules of the Society with reference to the exemption of such graduates from one year's attendance at lectures in the Law School.

Ordered, that the letter be referred to the Legal Education Committee, and that the said Committee be appointed to meet the Committee of the Senate as requested, and to report the result of such conference.

Ordered, that the Secretary be instructed to inform Mr. Joseph Prevost that the rules do not contain any provisions to meet his application for admission.

Ordered, that the letter from the Attorney-General's Department of May 7th, 1891, enclosing a letter from Messrs. O. Ormiston, L. K. Murton, and L. T. Barclay, be referred to the Legal Education Committee.

Ordered, that the letter of Mr. Mortimer Clark in reference to the establishment of a Widows' Fund be referred to the Finance Committee.

Ordered, that the payment of the architect's next certificates in favor of contractors be referred to Messrs. Irving and Moss, with power to draw checks for the required payments.

Ordered, that Mr. Harford Ashby's letter of 14th March, 1891, enclosing a copy of a Belleville newspaper, be received, and that no action in regard to the matters set forth in it be taken by Convocation while they are *sub judice.*

Saturday, May 23rd.

Convocation met.

Present—Messrs. Idington, Martin, Meredith, Shepley, Watson, Ritchie, Riddell, Barwick, Aylesworth, Bruce, Irving.

In the absence of the Treasurer, Mr. Irving was appointed Chairman.

The minutes of last meeting were read and confirmed.

Ordered, that the further consideration of the Report of the Discipline Committee upon the complaint of Mr. Armstrong against W. G. Fisher be adjourned to the next meeting of Convocation, and that Mr. Fisher be notified through his solicitor that Convocation will then take action in the matter, and that he will be at liberty to attend before it.

The Standing Committees were then elected in pursuance of Rule 29 as amended as follows:

Finance.—Messrs. S. H. Blake, Watson, Irving, Lash, Martin, Ritchie, Barwick, Hoskin, Bruce, Riddell, Douglas, Strathy.

Reporting.—Messrs. Britton, Aylesworth, McCarthy, Mackelcan, Ritchie, Teetzel, Shepley, Sir Adam Wilson, Osler, Magee, Macdougall, Idington.

Discipline.—Messrs. Bruce, Christie, Kerr, Mackelcan, Magee, Robinson, Shepley, Aylesworth, Hoskin, Guthrie, Sir Adam Wilson, Watson.

Library.—Messrs. S. H. Blake, Aylesworth, Watson, Riddell, Proudfoot, Moss, Robinson, Shepley, Irving, Barwick, Guthrie, Strathy.

County Libraries' Aid.—Messrs. Britton, Bruce, Guthrie, Hardy, Christie, Kerr, Meredith, Osler, Martin, Douglas, Strathy, Idington.

Legal Education.—Messrs. Ritchie, Hoskin, Barwick, Lash, Mackelcan, Meredith, Martin, Robinson, Moss, Teetzel, Riddell, Macdougall.

Journals and Printing.—Messrs. Idington, Britton, Bell, Fraser, Lash, Magee, Moss, Douglas, Kerr, Christie, Teetzel, Macdougall.

Ordered, that the Legal Education Committee and Messrs. Irving, McCarthy, Osler, and Shepley, be the Law School Building Committee for the present year.

Ordered, that the question of the Law School fees payable by students be referred to the Finance and Legal Education Committees for consideration and report.

Mr. Martin gave notice that he would move that one copy of the Exchequer Reports be ordered for and supplied to each of the County Libraries at the expense of the Law Society, and that the propriety of supplying the Supreme Court Reports to the profession be considered.

Mr. Riddell gave notice that he would move that the expense of lunches for Benchers be no longer paid out of the funds of the Society.

Mr. Watson gave notice that at the next meeting he would move for the appointment of a committee to consider the question of unlicensed conveyancers.

The Secretary was directed to issue notices to members of Standing Committees of meeting on Friday, 29th inst., to elect chairmen and other business.

Friday, May 29th.

Convocation met.

Present—Sir Adam Wilson, and Messrs. Martin, Strathy, Aylesworth, Teetzel, Kerr, Guthrie, Irving, Douglas, Ritchie, Mackelcan, Meredith, Britton, Lash, Barwick, Shepley, Riddell, Watson, Macdougall.

In the absence of the Treasurer, Mr. Irving was appointed Chairman.

The minutes of last meeting were read and approved.

The petitions of Daniel E. Sheppard and Thomas F. Lyall for call to the Bar under the new act were referred to the Legal Education Committee.

Ordered, that the letters of Messrs. Lount & Marsh of 18th and 27th inst., on the subject of the application of the Honorable J. G. Currie to the Supreme Court of Judicature, to be reinstated as a solicitor of the Court, be referred to the Discipline Committee with the reference in Mr. Currie's case already made to them.

The Report of the Discipline Committee on the case of Armstrong against Fisher was brought up for consideration.

Ordered, that Mr. Fisher should appear before Convocation with his counsel.

Mr. Fisher having appeared, the said report was read to him,

A resolution founded on the report was then carried:

Ordered, that Mr. Fisher attend before Convocation.

Mr. Fisher attended and the resolution was read to him.

Ordered, that the subject of Mr. Martin's motion in regard to supplying one copy of the Exchequer Reports to the County Libraries, and to supplying the profession with the Supreme Court Reports and the question of the reduction of the price of the digest now being compiled, be referred to the Reporting Committee.

Mr. Riddell's motion, that the expense of the lunches for Benchers should be no longer paid out of the funds of the Society, was lost on a vote of 12 to 4.

Ordered, that the question of unlicensed and unauthorized conveyancing be referred to the following committee, viz.:

The Attorney-General, and Messrs. Aylesworth, Barwick, Britton, Christie, Douglas, Fraser, Guthrie, Hardy, Idington, Macdougall, Magee, Meredith, Moss, Riddell, Ritchie, Shepley, Strathy, Teetzel, and Watson.

Saturday, June 6th.

Convocation met.

Present—Messrs. Moss, Teetzel, Martin, Britton, Watson, Meredith, Hardy, Irving, Barwick, Ritchie, Shepley, Osler, and Aylesworth.

In the absence of the Treasurer, Mr. Irving was appointed Chairman.

The Report of the Examiners of the Law School on the Third Year Examination, and on the examination for Honors in connection with the Third Year, was presented as follows:

The following gentlemen have passed their Third Year Examination, viz.:

William Stewart, N. Simpson, A. B. Armstrong, J. S. Denison, R. C. Gillett, C. F. Maxwell, J. J. Warren, T. H. Lloyd, F. R. Martin, Wm. Johnston, W. C. McCarthy, W. A. Lamport, J. F. Tannahill, F. R. Blewett, W. M. McKay, J. A. D. Leask, W. M. Campbell, J. Hales, N. P. Buckingham, W. A. Leys, H. Jamieson, G. F. Downes, W. H. Hodges, G. S. McDonald, A. S. Burnham, W. A. Baird, F. A. Haugh, P. Ritchie, J. N. Anderson, D. Grant, J. McBride, R. T. Harding, Edward Mortimer, C. H. Glassford, A. G. McLean, L. A. Smith, R. N. Noble, T. B. P. Stewart, J. H. D. Hulme, R. A. Hunt, A. J. Anderson, J. E. Cook, W. E. Burritt, J. B. Pattullo, J. A. Mather, J. W. Winnett, C. B. Rae, L. V. McBrady, R. G. H. Perryn, A. Bedford-Jones, W. J. McDonald, D. O'Brien, L. T. D. Hector, J. P. Deacon, N. Kent, G. R. Sweney, W. E. L. Hunter, S. T. Evans, K. H. Cameron, N. D. Mills, James Lennon, S. A. C. Greene.

The following gentlemen passed the Examination for Honors in connection with the third year, viz.:

(1) N. Simpson, (2) J. S. Denison, (3) C. F. Maxwell and J. J. Warren, ual, (4) W. A. Lamport, (5) Wm. Johnston.

The Legal Education Committee presented their Report thereon as follows:

The following gentlemen, who have duly passed the Law School Examination for the third year and are certified by the Principal to have duly attended the required number of lectures and whose papers for call are certified by the Secretary to be correct, are entitled to be called to the Bar forthwith, viz.:

Messrs. J. Hales, N. P. Buckingham, D. Grant, E. Montgomery, A. G. McLean.

The following gentlemen who passed the Law School Examination for the third year failed o attend the required number of lectures, but the Principal certifies that such failure was due to illness, viz.: H. Jamieson, R. N. Noble.

The Secretary reports that the papers for call are correct. The Committee recommends that they be called to the Bar forthwith.

The other gentlemen who are certified by the Examiners to have duly passed the Law School Examination for the third year are not entitled to be called to the Bar at present, and their cases are not dealt with until the time arrives when they are entitled to present themselves for call.

The Report was read and adopted.

Ordered, that so much of the Examiner's Report as relates to the examination of gentlemen whose time to be called to the Bar has not arrived shall stand for the present, and that as the time for call for candidates on Honor Examinations has not yet arrived the Report on Honors do stand.

Ordered, that the application of Mr. E. Cross to be admitted as a student be not granted, as not coming within the rule.

Ordered, that the petition of Mr. L. U. C. Titus to be restored to the Roll of Solicitors be referred to the Discipline Committee with a request that they instruct the solicitor to have the application postponed till after the Discipline Committee have an opportunity to make enquiries and report to Convocation on June 30th, or to a further day if found expedient, and that Mr. Shepley be requested to act as convener of the Discipline Committee for this purpose.

The letter from the Osgoode Hall Lawn Tennis Club in regard to a dressing-room was deferred till after the completion of the new building.

Ordered, that Duncan Donald's petition for leave to put in a notice for admission *nunc pro tunc* be granted.

Ordered, that Mr. Moss, Q.C., be appointed a member of the Senate of the University of Toronto to represent the Law Society.

The rule respecting graduates of the Military College at Kingston was read a second and third time and passed, and is as follows:

(1) A cadet of the Royal Military College who has received his diploma of graduation shall be entitled to be admitted on the books of the Society as a Student-at-Law or Articled Clerk, and subject to the same terms and conditions as a graduate in the Faculty of Arts is or shall for the time being be entitled to admission thereon.

(2) Every such cadet shall be entitled to be called to the Bar and to be admitted and enrolled as a solicitor after the like period of service and on and subject to the like terms and conditions as are and shall for the time being be applicable to a graduate in the Faculty of Arts.

(3) The provisions of these rules shall apply retrospectively, so as to entitle any such cadet who has heretofore been admitted on the books of the Society and has not yet been called to the Bar or admitted and enrolled as a solicitor to apply to be so-called or admitted and enrolled after the like period of service as is required in the case of Graduates of Arts.

The Secretary was directed to prepare a list of the solicitors who can apply to Convocation under the amendment to Rule 120 for call to the Bar and a circular with the approval of the Finance Committee for transmission to each of such solicitors.

Tuesday, June 30th.

Convocation met.

Present—Messrs. Moss, Bell, Shepley, Mackelcan, Martin, Barwick, Ritchie, Aylesworth, Lash, S. H. Blake, Irving, Bruce, Strathy, Watson, Macdougall, Douglas.

In the absence of the Treasurer, Mr. Irving was appointed Chairman.

The minutes of the last meeting were read and confirmed.

On motion duly made, a resolution of condolence with the widow and family of the late Right Honorable Sir John A. Macdonald was passed.

Ordered, that the same be engrossed and forwarded to Lady Macdonald.

Ordered, that the service of J. O'Donnell Dromgole be allowed.

Ordered, that the consideration of the Report of the Legal Education Committeee on the case of Mr. D. B. S. Crothers be deferred until the second day of Trinity Term.

Ordered, that Mr. T. H. Addison be admitted as of the first day of Easter Term, 1891.

The Legal Education Committee reported the results of the first and second year examinations of the Law School.

Ordered, that the following gentlemen be allowed their first year examinations, viz.:

Messrs. J. C. Haight, W. E. Woodruff, W. A. Fraser, A. T. Thompson, W. A. H. Kerr, D. Plewes, A. H. Sinclair, G. H. D. Lee, George Kelly, W. R. Givens, G. A. Harcourt, J. F. Smellie, W. A. Wilson, J. W. Mallon, A. F. McMichael, Alexander Smith, John Lamont, C. F. E. Evans, J. G. Campbell, G. J. Ashworth, J. A. McKay, W. B. Wilkinson, N. B. Eagen, W. H. Holmes, R. Bradford, A. C. McMaster, W. Brydone, W. C. Hall, J. T. Thomson.

Ordered that the following gentlemen be allowed their second year examinations, viz.:

Messrs. C. H. Barker, J. H. Moss, A. Y. Blain, F. C. Snider, S. V. Blake, D. R. Tate, F. W. McConnell, W. Cross, R. M. Lett, J. D. Swanson, A. E. Scanlan, R. L. Johnston, G. A. Kingston, J. G. Smith, J. E. Jeffrey, H. J. Martin, J. D. Spence, R. J. Gibson, M. J. O'Connor, G. E. J. Brown, B. M. Aikens, W. H. Grant, G. St. V. Morgan, F. C. Cooke, D. R. C. Martin, F. King, W. J. Boland, J. E. O'Connor, G. C. Biggar, T. B. Martin, W. T. J. Lee, F. S. Costello, W. M. Allen, F. M. Canniff, J. R. Blake, J. Henderson, J. N. Fish, J. B. Quinton, S. Griffin, H. F. McLeod, E. C. Senkler, J. H. Coburn, M. A. Brown, A. Bain, W. J. Dick, W. D. Earngey, Strachan Johnston, J. T. Copeland, A. S. Macdonald, C. R. Hamilton, T. R. E. McInnes, F. Jones, T. C. Gordon, C. S. Coatsworth, W. Carney, G. E. Powell, S. F. Houston, H. W. Maw.

So much of the Reports as referred to Honors and Scholarships was referred to a Special Committee composed of Messrs. Lash, Bruce, and Watson.

On motion of Mr. Lash, it was ordered

That of the candidates who may be found by the Special Committee to have passed with Honors at the Law School Examinations held in June, 1891, and allowed to them in lieu of the First and Second Intermediate Examinations

respectively, the first of such candidates of each class be awarded a scholarship of one hundred dollars, the second a scholarship of sixty dollars, and each of the next five a scholarship of forty dollars.

The Report of the Discipline Committee on the case of Mr. L. U. C. Titus was presented.

Ordered, that instructions be given to the solicitor to appear on the petition for reinstatement, and to ask the Court to direct it to stand over until Mr. Titus has applied to Convocation with respect to the matter and has satisfied Convocation of the propriety of his application.

The County Libraries Aid Committee presented their report in reference to the County of Simcoe Law Association.

Ordered, that the usual initiatory grant be made to the association, which will amount to six hundred and ten dollars, being double the amount of the cash paid in, but not exceeding the maximum sum of twenty dollars or each practitioner in the county.

The County Libraries Aid Committee presented their Report recommending:—

(1) That a loan of five hundred dollars be made to the Carleton Law Association, under the provisions of Rule 78, to be repayable in two equal yearly payments, and that security be given for such repayment in the form adopted in other similar cases.

(2) That a loan be made to the County of Norfolk Law Association of one hundred and sixty dollars, the conditions of the loan to be the same as recommended in the case of the Carleton Law Association above referred to.

(3) That a loan of two hundred and fifty dollars be made to the County of Perth Law Association on the same conditions.

(4) That the County of Wellington Law Association be granted an allowance equal to the cost of the Supreme Court Reports from the date of the incorporation of the Association, and that the amount, when established to the satisfaction of the Chairman of this Committee, be paid to the County of Wellington Law Association.

Ordered accordingly.

Mr. Blake, from the Special Committee, presented their Report on the petition of Clara Brett Martin to be admitted as a student, submitting that authority was not intended to be given to the Law Society to admit women as members thereof, and that the statutes, rules, and regulations do not authorize it, and that the prayer of the petition should not be granted.

Ordered, that a copy of the Report be sent to every Bencher, including the memorandum of cases, and that the consideration of the Report be deferred to the second day of Trinity Term, 1891.

(*To be continued.*)

DIARY FOR DECEMBER.

1. Tues....General Sessions and County Court sittings for Trial in York.
3. Thur....Chancery Division High Court of Justice sits.
4. Fri.....Last day for paying fees for Annual Certificates.
5. Sat.....Michaelmas Term ends.
6. Sun.....*2nd Sunday in Advent.* Rebellion broke out, 1837.
7. Mon.....Rebels defeated at Toronto, 1837.
8. Tues.....County Court sittings for Trial except in York. Sir W. Campbell, 6th C.J. of Q.B., 1825.
10. Thur.....Niagara destroyed by U.S. troops, 1813.
13. Sun.....*3rd Sunday in Advent.*
15. Tues.....J. B. Macaulay, 1st C.J. of C.P., 1849.
17. Thur....First Lower Canadian Parliament met, 1792.
18. Fri.....Slavery abolished in the United States, 1862.
19. Sat.....Fort Niagara captured, 1813.
20. Sun.....*4th Sunday in Advent.*
21. Mon.....St. Thomas. Shortest day.
24. Thur....Christmas Vacation begins.
25. Fri.....Christmas Day.
26. Sat.....St. Stephen. Upper Canada made a province, 1791.
27. Sun.....*1st Sunday after Christmas.* St. John. J.G. Spragge, 3rd Chan., 1869.
28. Mon.....Innocents' Day.
31. Thur....Montgomery repulsed at Quebec, 1775.

Reports.

ONTARIO.

COUNTY COURT, COUNTY OF YORK.

(Reported for THE CANADA LAW JOURNAL.)

JONES *v.* PAXTON.

Division courts — Transcript of judgment— R.S.O. (1887), c. 51, s. 223—Nullity or irregularity—Negligence of sheriff.

Where a judgment was obtained in a Division Court in one county, and, without execution being issued thereon, a transcript was issued to a Division Court of another county and an execution issued thereon and returned *nulla bona*, and a transcript then obtained to the County Court of the latter county, it was

Held, that the judgment of the County Court was a nullity, since the transcript did not show the return to the writ in the original Division Court, as required by R.S.O., c. 51, s. 223; and

Held, also, that a sheriff sued for negligence in making a return to an execution from the County Court can set up as a defence the nullity of the judgment.

[Toronto, Oct. 30th, 1891.

This was an action against a sheriff for false return and negligence. The jury found negligence, and fixed the damages at $80. A motion was made for a new trial or verdict for the defendant.

It was admitted, upon the argument, that the judgment upon which the writ of *fi. fa.* issued, and in respect of the due execution of which the negligence is assigned, was a transcript from the Fourth Division Court of the County of Ontario. Upon the original Division Court judgment, no execution was issued in the Fourth Division Court of Ontario. Prior to the Division Court judgment being made a judgment of the County Court, a transcript had been sent to the Fifth Division Court of the County of York, and execution issued thereon, and duly returned *nulla bona;* but nothing was done in the home court until the transcript was issued to the County Court of York. The defendant contended that the so-called County Court judgment was and is utterly void, and all proceedings thereon; and that the defendant, a sheriff, can avail himself of this fact as a defence to the present action against him for damages for negligence.

The plaintiff contended that, at most, the defects complained of were mere irregularities and that being such the sheriff cannot avail himself of them as a defence, he being a stranger to the proceedings: *Macdonald* v. *Crombie*, 2 O.R. 246; *Glass* v. *Cameron*, 9 O.R. 715.

Aylesworth, Q.C., for the plaintiff.

E. D. Armour, Q.C., for the defendant.

MCDOUGALL, Co. J.:—Let us first consider whether the failure to issue execution in the Division Court where the judgment was first obtained is a mere irregularity, or whether in consequence of the failure to do so the judgment is a nullity. *Farr* v. *Robins*, 12 C.P. 35, decided that where the transcript to the County Court did not contain a statement that a *fi. fa.* against goods had issued in the original Division Court the transcript was informal and the judgment a nullity, and that no *fi. fa.* lands could issue thereon. Draper, C.J., stated: "The legislature having adopted the principle that an execution against lands must be founded on a record, and as the Division Court is not a court of record, they have provided a method by which its judgment may be made a record of the County Court, and thereupon an execution against lands may issue; but in order that the transcript may become a judgment of record, they have required that it should, amongst other things, show the date of issuing execution against goods, and the return to that writ. The objection is not to irregularities in the proceedings anterior to the judgment, nor can I look upon this transcript as having become the judgment of the County Court, because it is not such a transcript as, upon filing and entry, the statute clothes with that character.

There is no such judgment, unless this transcript filed and entered be one, and that, as appears to me, is not such a judgment, because the transcript does not contain what the statute requires."

In *Hope* v. *Groves*, 14 C.P. 393, it was held that a transcript of a judgment to the County Court, regular on its face, was a nullity, it being shown as a fact that the transcript did not disclose the true nature of the proceedings taken in the Division Court, which were commenced by writ of attachment and not by an ordinary summons. John Wilson, J., said that the legislature had pointed out the way to make judgments of Division Courts judgments of the County Court, and, the statutes not having been complied with, he held all the proceedings taken upon the so-called County Court judgment void, and set aside a sale of land had upon a *fi. fa.* issued upon a judgment apparently regular on its face, but defective in fact, as appeared when the actual proceedings had in the Division Court were enquired into.

In *Burgess* v. *Tully*, 24 C.P. 594, it was expressly held that an execution against goods and chattels must issue out of the Division Court in which the judgment was originally recovered, and be returned *nulla bona*, before a transcript of the judgment could be transmitted and filed in the County Court. That case was like the present one, in that there had been a transcript to another Division Court, and execution against goods issued in this last mentioned court and returned *nulla bona*. All proceedings under a judgment similar to the one in question, in all respects as to its defects, were held void. The judgment is therefore bad on its face, in not showing the issue and the return of *nulla bona* against goods of an execution in the Division Court in which the judgment was originally recovered. It is a nullity and cannot be amended or cured, because the statutory condition has not been performed which enables it to be made a judgment of the County Court.

Next, can the circumstances of the judgment, being a nullity, be set up by the sheriff, the defendant, as an answer to an action against him for negligence? The case of *Lane* v. *Chapman*, 11 Ad. & El. 966, is directly in point; for there it was expressly held that a marshal who was sued for an escape could avail himself of the defence that the judgment was a nullity. Lord Denman, in that case, says that the question to be determined was whether the judgment was absolutely void, under certain statutes, for he said: "If it was, no reason has been assigned or authority cited that satisfies us that the marshal might not avail himself of its being void as a defence to the action."

Mr. Aylesworth referred to an amendment made to section 218 of the Division Court Act passed in 1882; but, after careful consideration of that amendment, I fail to see that it in any way qualifies or varies the statutory requirements necessary to constitute a Division Court judgment a valid judgment in the County Court.

I must, therefore, direct the verdict herein in favor of the plaintiff to be set aside, and judgment entered for the defendant with costs.

MECHANICS' LIENS.

(Reported for THE CANADA LAW JOURNAL.)

WATSON *v.* KENNEDY.

Mechanics' lien—Summary proceeding to enforce—53 Vict., c. 37, s. 25—Jurisaiction of Master—Claims of other lien holders—Costs.

The expression in the Mechanics Lien Act, 53 Vict., c. 37, ss. 25 & 26, "lienholder entitled to the benefit of the action," means one who has substantial, not apparent, rights which are capable of being enforced in the action.

Therefore, a lienholder who, on the day the plaintiff instituted his proceedings, appeared to have a registered lien on the property in question, but who, the day preceding, had signed a discharge which was not registered until after the registration of the Master's certificate in this action, was held not to be entitled to the benefit of the action, and the plaintiff could not add his claim to the other lienholders' claims, so as to make the aggregate amount sufficient to give the High Court jurisdiction.

Where a statutory tribunal has no jurisdiction over the subject matter of a proceeding, it can award no costs.

Observations on the jurisdiction of a Master, under the act simplifying procedure in mechanics' lien actions (53 Vict., c. 37), to add parties to the summary proceedings under that act.

(Toronto, Nov. 7th, 1891.

This was a proceeding to enforce a mechanics' lien begun in the Master's office under the provisions of the act to simplify the procedure for enforcing mechanics' liens, 53 Vict., c. 37.

The facts sufficiently appear from the judgment.

Church for the plaintiff.

O. Macklem, Cooper, and Poole, for other parties.

THE MASTER IN ORDINARY :—The plaintiff seeks to amend his statement of claim herein by adding, as defendants claiming liens on the land in question, the following parties: McMullen Brothers and Millichamp, who claim a lien to the amount of $98; and McTaggart & Leishman, who had registered a lien to the amount of $151.29. These sums, when added to the amount claimed by the plaintiff ($94.50), make $343.79.

But it is admitted that the lien of McTaggart & Leishman had been discharged by a certificate of discharge, dated 7th October, and registered on the 8th October, after the registration of the certificate issued on the same day (8th October) in this proceeding, and the question is: Can the amount of McTaggart & Leishman's lien be added to the other two, so as to give the High Court jurisdiction to entertain this claim?

The 25th section of the Act of 1890 enacts that the plaintiff in these proceedings shall be deemed sufficiently to represent "all other lienholders entitled to the benefit of the action;" and, by section 26, a right to apply to have the carriage of the proceedings is conferred upon "any lienholder entitled to the benefit of the action." If the Act had used the expression "all other *registered* lienholders," I think the case of *Hall* v. *Pilz*, 11 P.R. 449, would have disposed of the question. That case construed the expression "all the lienholders of the same class who shall have *registered* their liens" as meaning all those who had an apparent right by virtue of the registration of their liens. But this later Act omits the word "registered," and by its use of the words "entitled to the benefit" excludes from the rights represented in the plaintiff's proceedings those not so entitled, and thus limits the plaintiff's representative action to those who have substantial, not apparent, rights in the subject-matter which are capable of being judicially enforced in the action. The rule in such representative actions is that no persons should be made parties to such actions but those claiming some right: *Alloway* v. *Alloway*, 2 Con. & L. at p. 512; and the plaintiff in such action must have a common interest with the persons he seeks to represent: *Fawcett* v. *Laurie*, 1 Dr. & Sm. 192; 7 Jur. N.S. 61. As says Lord Cottenham, L.C., in *Mozely* v. *Alston*, 1 Phil. 798, the relief which is prayed in a representative action must be one in which the parties whom the plaintiff professes to represent have all of them an interest identical with his own. And in *Gray* v. *Pearson*, L.R. 5 C.P. 568, it was held to be a rule of procedure in England, and also one affecting all sound procedure, that the proper person to bring an action is the person whose right has been affected; and this rule, when extended to representative actions, includes all persons there represented. As an illustration of this rule, the case of *Pryce* v. *Belcher*, 4 C.B. 867, may be cited, where, in an action brought against a returning officer by a person who had an apparent right to vote by being entered on the register of voters, but who had lost his right by non-residence, it was held that having lost his right to vote he had no cause of action. The court held that the foundation of his right of action was an injury to his right to vote, and as he had no such right he had suffered no injury.

As to the plaintiff's right to amend, I may add that the case of *Bickerton* v. *Dakin*, 20 O.R. 192, 695, shows that the Master may give leave to amend the plaintiff's statement of claim as a pleading in a proper case. But the cases as to the power of a court to amend, so as to give itself jurisdiction, are not harmonious. In *Jackson* v. *Ashton*, 10 Peters U.S. 480, STORY, J., intimated an opinion that the court of first instance had power to amend the proceedings by inserting a necessary allegation which would give the court jurisdiction. But in *Taylor* v. *Addyman*, 13 C.B. at p. 316, Maule, J., observed that a county court judge had no power to allow amendments in a proceeding which was not within his jurisdiction; that he could neither amend nor adjourn, nor do anything else, as the proceeding was *coram non judice*. And in *Austin* v. *Dowling*, L.R. 5 C.P. 534, it was held improper for a county court judge to admit evidence of a matter which was beyond the jurisdiction of the county court.

There is also a question whether a Master has jurisdiction, in these summary proceedings, to issue any process making persons lienholders, mortgagees, or execution creditors, who have not been named on the record parties to the action against their will. They may come in voluntarily and submit to be bound by the proceedings. The act may intend that such persons should be named on the record in the

ance; for it is silent respecting the
add parties, and the rules (if imported
statutory jurisdiction) give Masters
legated jurisdiction to add certain
parties after a judgment of the court
ed the rights to be litigated in the
This new jurisdiction is statutory, and
rned by well-understood rules of con-
tion; but as a decision is not necessary
this case, it may be proper to reserve the question for further consideration and argument. But see *McPherson* v *Gedge*, 4 O.R. 246.

Without deciding as to the right to amend, I must, on the question of the plaintiff's right to claim the benefit of the amount of McTaggart & Leishman's lien, so as to give the High Court jurisdiction, hold that, as those parties had discharged (but not registered) their lien on the day before this action was commenced, they were not "lienholders entitled to the benefit of this action." As I have, therefore, no jurisdiction in this action, I can give no costs; see *Re Isaac*, 4 M. & Cr. 11, and *Re Charity Schools of St. Dunstan*, L.R. 12 Eq. 537.

MASTER'S OFFICE.

(Reported for THE CANADA LAW JOURNAL.)

IN RE BENNETT.

Quarantine—Right of widow to.

A widow is entitled to residence in house of deceased husband, and to maintenance out of his estate, for forty days after his death.

[MASTER IN ORDINARY, Oct. 10th, 1891.

This was an administration proceeding, in which a reference was directed to the Master in Ordinary. The widow of the intestate, whose estate was in administration, claimed to be relieved from accounting for certain quantities of wheat, potatoes, pork, apples, pickles, preserves, and firewood—all of the value of $31.58—used by her for her maintenance on the farm of the testator for the forty days' period of quarantine succeeding the death of her husband.

J. C. Hamilton for the widow.

Baird for next of kin.

MR. HODGINS, Q.C., Master in Ordinary:—The right of a widow to quarantine is thus stated in an old authority (Termes de la Ley): "Quarantine is where a man dyeth seized of a manor-place and other lands, whereof the wife ought to be endowed; then the woman may abide in the manor-place and there live of the store and profits thereof the space of forty days, within which time her dower shall be assigned." In *Callaghan* v. *Callaghan*, 1 C.P. 348, Sir James Macaulay, C.J., referred to a widow's quarantine as "a right to reside in the dwelling-house concurrently with the heir, and to receive her reasonable maintenance during forty days after her husband's death." See also *Lucas* v. *Knox*, 3 O.R. 453.

I think, therefore, that the widow is entitled to be relieved from accounting for the $31.58 claimed by her.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

Div'l Court.] [Nov. 16.

DAVIES *v.* GILLARD.

Assignments and preferences—R.S.O., c. 124, s. 2—Chattel mortgage to creditor by insolvent debtor over all his property—Pressure—Collusion.

In an action to have a chattel mortgage made by a debtor to certain creditors declared fraudulent and void, as against other creditors, it was found at the trial that at and before the time of the execution of the mortgage the debtor was in insolvent circumstances and unable to pay his debts in full, as he well knew; that the mortgagees were well aware of the fact and took the mortgage with a full knowledge of it; that their object in taking the mortgage was to obtain security for their their debt; that the necessary effect was to defeat, delay and prejudice the creditors of the mortgagor, and to give the mortgagees a preference over the other creditors; and that the mortgagees, at and before the execution of the mortgage, knew that it would have such effect. It also appeared that the property covered by the chattel mortgage was all that the debtor had, and that he knew that he had many creditors who could not be paid.

Held, per ARMOUR, C.J., at the trial, following *Molsons Bank* v. *Halter*, 18 S.C.R. 88, that

the mortgage was not assailable under R.S.O., c. 124, s. 2, notwithstanding the findings of fact, because the mortgagees had requested the debtor to give them the security.

The judgment was reversed in the Divisional Court.

Per FALCONBRIDGE, J. It follows from the findings of fact that the pressure was merely a sham pressure—a piece of collusion.

Per STREET, J. There was *bonâ fide* pressure, but the doctrine of pressure does not apply where the debtor has transferred the whole of his property.

W. Cassels, Q.C., and *J. W. Curry*, for the plaintiffs.

W. F. Walker, Q.C., for the defendants.

MITCHELL *v.* MCCAULEY.

Landlord and tenant—Rent reserved—Acceleration of payment by issue of execution against tenant—Landlord procuring issue of execution—Responsibility of tenant—Right of distress—Payment of amount due under execution—Election—Forfeiture of term—Severance of reversion—Apportionment of rent—Evidence of consent of tenant—Distress on wrong premises—Ratification—Re-entry—Notice—R.S.O., c. 143, s. 11, s-s. 1—Covenant running with reversion—Benefit of acceleration clause—Assignee of part of reversion.

A lease contained a provision that in case any writ of execution should be issued against the goods of the lessee (the plaintiff), the then current year's rent should immediately become due and payable, and the term forfeited. The lessor having assigned part of the reversion to W. and part to the defendant, the latter gave information to a creditor of the plaintiff, which led to the plaintiff's being sued in the Division Court and suffering judgment, on which execution issued, and thereupon the defendant distrained upon the plaintiff's goods by virtue of the acceleration clause, there being no rent otherwise due.

In an action for wrongful distress, the trial judge found that the defendant had procured the obtaining of the judgment against the plaintiff, and that it had been paid before the distress without any seizure, and he was of opinion that the defendant could not treat it as accelerating the payment of the rent, and gave judgment for the plaintiff.

Upon appeal to a Divisional Court, the two judges composing it failed to agree.

Held, per STREET, J., (1) that the recovery of the judgment against the plaintiff was ascribable to his own default in not paying upon being served with the summons, and he alone was responsible for the consequences.

(2) That the payment of the amount of the execution without seizure before the defendant had elected to take advantage of its issue did not take away the right to distrain; for the acceleration of the rent and the forfeiture of the term were two distinct matters, and a lessor, not having elected to forfeit the term, might lawfully distrain for the accelerated rent.

Linton v. *Imperial Hotel Co.*, 16 A.R. 337, followed.

(3) That the rent was properly apportioned between W. and the defendant; for it was sufficient evidence of the plaintiff's consent to the apportionment made by his landlords that he had (though he said he always paid the whole rent to them together), on at least one occasion, made separate arrangements with W. for the payment of his proportion of it.

(4) That the action of the defendant's bailiff in first making a distress upon the part of the demised premises of which the reversion was in W. did not bind the defendant, in the absence of ratification by him, and did not therefore exhaust his right of distress.

Lewis v. *Read*, 13 M. & W. 834, and *Ferrier* v. *Cole*, 15 U.C.R. 561, followed.

(5) That the distress was not so connected with the right of re-entry as to bring it within s. 11, s-s. 1, of R.S.O., c. 143, requiring a notice to be given.

(6) That the acceleration clause was to be read as part of the covenant for the payment of the rent and as qualifying the time fixed for payment, and, as such, it was a covenant running with the reversion.

(7) That the acceleration clause made the rent (upon the happening of the event) payable as rent reserved, and was not to be construed as a condition which had been destroyed by the severance of the reversion.

Per ARMOUR, C.J. The rent distrained for was not payable by virtue of any reservation in the lease, but solely by virtue of the condition, and the benefit of such a condition does not pass to the grantee of a part of the rever

sion so as to entitle him to distrain for a breach thereof.

Douglas, Q.C., for the plaintiff.

Aylesworth, Q.C., for the defendant.

[Nov. 20.

RE MCPHERSON *v.* MCPHEE.

Prohibition—Division Court—Judge reserving judgment without naming hour—R.S.O., c. 51, s. 144—Prejudice—Waiver.

Decision of STREET, J., *ante* p. 444, 21 O.R. 280, affirmed on appeal.

Douglas Armour for the plaintiff.

M. Wilkins for the defendant.

THOMPSON *v.* CLARKSON.

Assignments and preferences—Inspector of insolvent estate — Purchaser of estate from assignee—R.S.O., c. 124.

An inspector of an insolvent estate appointed by the creditors under R.S.O., c. 124, who acts towards the assignee in an advisory capacity, cannot become a purchaser of the estate.

Semble, *per* ARMOUR, C.J., that a private sale by an assignee to an ordinary creditor would also be open to objection.

Watson, Q.C., for the plaintiff.

Delamere, Q.C., for the defendants Ray and Street.

George Bell for the defendant Clarkson.

Chancery Division.

BOYD, C.] [Sept. 3.

RE THE ESSEX LAND AND TIMBER CO. TROUT'S CASE.

Mortgage to secure endorsations—Winding-up proceedings—Petition—R.S.C., c. 120, s. 48—Jurisdiction—R.S.C., c. 129, s. 39—Relief by foreclosure or sale.

A president of a company had taken a mortgage from the company to secure him on endorsations and had assigned it to the bank which made the advances; but on settlement by him with the bank for the amounts due had obtained a reassignment, and applied by petition, in winding-up proceedings, for an order to the liquidator to convey to him the equity of redemption in the mortgaged lands, as they were not worth the amount of his liability

Held, on the evidence, that there was no violation of s. 48, R.S.C., c. 120.

Held, also, that under R.S.C., c. 129, s. 39, there was jurisdiction in the court to make the order, and that it was a matter of convenience and discretion as to when an action would be directed or summary proceedings would be sanctioned, and the usual order for foreclosure or sale was made.

D. E. Thomson, Q.C., for the petitioner.

E. D. Armour, and *C. J. Holman*, for execution creditors.

W. M. Douglas for the liquidator.

BOYD, C.] [Oct. 2.

MURRAY ET AL. *v.* BLACK ET AL.

Will—Devise—Products and services chargea on land—Tender of, and refusal to accept—Compensation.

A testator by his will devised his farm to his grandson, charged with the supply of certain products and personal services in favor of a daughter and a granddaughter.

On a disagreement between the parties, a tender of the products and services was made and refused, and an action was brought to have them declared a charge on the land and for a money compensation.

Held, on an appeal from a master, that the refusal of the products did not deprive the plaintiffs of the right to afterwards recover their value, but that no compensation should be allowed for the personal services proffered and refused.

Laidlaw, Q.C., for the plaintiffs.

H. Cassels for the infant defendant.

J. A. Macdonald for the tenants.

BOYD, C.] [Oct. 20.

DAME *v.* SLATER ET AL.

Husband and wife — Wife's separate estate—Agreement to charge—"Sole"—"Separate."

A husband agreed to sell certain land, and his wife, who was married to him in 1866 without any marriage settlement and had acquired property in 1870, under a deed to her, her heirs and assigns, "to and for her and their *sole* and only use forever," joined in the agreement for the purpose of securing its being carried out and charged her land to the extent of $1,000.

Held, that in such a conveyance the word "sole" may or not mean "separate," according

to the context, but that in this case the wife's land was charged.

A. W. Aytoun-Finlay for the plaintiff.

Hoyles, Q.C., for the defendants.

BOYD, C.] [Nov. 2.

SWEETLAND *v.* NEVILLE.

Married woman—Separate estate—Money in saving bank—Gift of husband.

Where it appeared that a married woman, on the day of entering into a money bond, had deposited in her name in the post office savings bank a certain sum of money which the evidence showed was money given to her by her husband, but of which, as against her husband, she seemed to have the absolute disposal by his consent and wish,

Held, that this was sufficient on which to found a proprietary judgment against the wife, though it was not shown that the bond was not executed at an earlier hour than that at which the money was deposited.

Henderson for the plaintiff.

R. Lees, Q.C., for the defendant.

FERGUSON, J.] [Nov. 7.

JUDSON *v.* CITY OF TORONTO.

Municipal corporation—Ridge of ice—Negligence.

The plaintiff was injured by slipping upon a ridge of ice on a sidewalk opposite a vacant lot. The ridge ran lengthwise of the sidewalk and about the middle of it, and was about four inches high along its middle line, and with a base of about fifteen to eighteen inches wide, the slope of its side being a sharp inclination. The rest of the sidewalk was clear, having had all snowfalls removed from it by the defendants' men, who, however, having no proper implements for removing the ridge of ice, had allowed it to remain. It appeared that the ridge was formed by people travelling along the sidewalk after the snow had fallen in a sort of path or line before the snow had been shovelled off. The defendants had full notice of the existence of this ridge.

Held, that they were responsible in damages to the plaintiff.

J. A. Macdonald for the plaintiff.

H. M. Mowat for the defendants.

Practice.

BOYD, C.] [Nov. 17.

IN RE WILLIAMS AND MCKINNON.

Administrator ad litem—Rule 311—Devolution of Estates Act—Real estate—Application before action.

Rule 311, though in existence (s. 11 of 48 Vict., c. 13 (O.)) before the passing of the Devolution of Estates Act, may be applied as to realty falling under the operation of that act.

If it appears that there is no personalty, or personalty of such trifling amount as will not suffice to answer the claims made in respect of the deceased's real estate against which litigation is brought or is impending, administration *ad litem* made be granted under the rule, limited to the real estate in question.

An application for appointment of an administrator *ad litem* is properly made before action.

Hoyles, Q.C., for the applicant.

J. Hoskin, Q.C., for the infants.

VAUGHAN ROAD CO. *v.* FISHER.

Consolidation of actions—Identity of issues—Test action—Staying proceedings—Separate assessments of damages.

Four actions were brought by the same plaintiffs against different defendants for damages for trespass in refusing to pay toll and forcing past the toll-gates. The pleadings were identical, and the main issue was common to all the actions; but it was admitted that if the plaintiffs had a substantial cause of action, there must be a separate assessment of damages in each case.

Upon a motion by the defendants to consolidate the actions,

Held, that one of the actions should be tried as a test for all, and that proceedings in the other actions should be stayed till the test action should have been determined, after which the assessments should proceed according to the result on the main question; or, if the defendants would each submit to pay the largest amount of damages that might be awarded in the test action, that all proceedings should be stayed in all actions, except that in which the plaintiffs expected to recover the largest amount, and such action should be alone litigated.

C. W. Kerr for the plaintiffs.

A. G. F. Lawrence for the defendants.

The Canada Law Journal.

VOL. XXVII. DECEMBER 31, 1891. No. 20.

The Intercollegiate Law Journal is the title of a new publication hailing from New York, and intended to be devoted to the interests of the various law schools and universities throughout the United States and Canada. The editorial board is composed of representatives from apparently every known law university and school, Osgoode Hall being also represented. *The Journal* should be a welcome addition to our legal exchanges.

THE decision of the Court of Appeal in *McMichael* v. *Wilkie*, 18 A.R. 464, establishes an important exception to the rule of equity, that a purchaser of an estate subject to a mortgage is, notwithstanding the absence of any express agreement so to do, bound to indemnify his vendor against the mortgage. This equitable doctrine appears to have been founded on a *dictum* of Lord Eldon in *Waring* v. *Ward*, 7 Ves. at p. 337, where he asserts that a court of equity imposes the obligation on the conscience of the purchaser, independently of any contract, if the purchaser is let into possession and receives the profits. This doctrine was recently applied by Boyd, C., in *Boyd* v. *Johnston*, 19 O.R. 598.

The Court of Appeal, by the decision we have referred to, exempts a married woman who becomes a purchaser of an estate subject to a mortgage from this equitable obligation, the reason assigned being that it does not arise by contract, and it is only by contract that she can bind her separate estate. The married woman appears to be the object of the peculiar solicitude of our modern courts of justice; and if by any ingenious argument she can be relieved from the liabilities of less favored mortals, she may be sure that it will not be wanting.

It is, perhaps, presumptuous to dispute, or even to suggest a doubt as to the correctness of the opinion that this equitable obligation is not founded in contract; and yet, at the risk of incurring that charge, we cannot forbear asking, is it really so plain that it is not founded in contract? When a man buys a piece of land subject to a mortgage, is not the amount of the mortgage really a part of the price of the land, and is he not, by virtue of his contract, as much bound to pay that part of the price as he is that part which may be payable in cash to his vendor?

If a married woman can make a valid contract to buy a piece of land, and can bind her separate estate to pay the price which is payable in cash to the vendor, on what principle, consistent with common sense, ought her estate to be exempted from paying that other part of the purchase money which is payable to the mortgagee? But we are forgetting. The law, though sometimes supposed to be "the perfection of reason," has often very little to do with such a plebeian quality as common sense.

DOMINION LEGISLATION OF 1891.

The session of 1891, instead of being, as was generally expected, brief in duration and unimportant in results, was not only prolonged far beyond the usual term of sitting, and remarkable for the incidents which occurred during its progress, but was also prolific of useful and necessary legislation. Into the events which caused the unusual length of the session it is not our province to enter, nor do the incidents connected with it come within the scope of our enquiry. It is for us, however, briefly to review the numerous Acts which, amid the din of party strife and the investigations which chiefly occupied the time and attention of Parliament, were placed upon the statute book, and for which the country is mainly indebted to the ability, industry, and perseverance of that indefatigable and painstaking jurist, the present Minister of Justice.

Referring, then, to these Acts in the order in which they appear in the statutes, we find, after a measure continuing for the present season the arrangement under which American fishing vessels are allowed the privilege of sharing in our fisheries, pending a permanent settlement of the questions in dispute, three Acts of great importance relating to matters at issue between the Dominion and Provincial Governments. The first relates to matters in dispute between the Governments of Canada and Ontario respecting certain Indian reserves in what was known as the disputed territory, and which may, if after enquiry they are not considered satisfactorily arranged, be referred to a commission. The second of these Acts provides for a reference to arbitration of the outstanding accounts between the Dominion and the Provinces of Ontario and Quebec, which, not much to the credit of any of the parties concerned, have been allowed to remain for so many years in dispute; and the third authorizes the transfer to the provincial authorities, as being the body most competent to control them, all the interests of the Government of the Dominion in the foreshores of streams, lakes, and harbors, and other territorial waters of Canada, with certain specified exceptions.

Chapter 17 is an Act to amend the Bills of Exchange Act, 1890. The amendments sought by the first three sections are intended to make it clear that bills and notes payable at sight are entitled to the usual three days of grace. Section 24 of the Act of 1890 is amended by s. 4 of the Act before us, making an important change in the original section, which provided that a forged or unauthorized signature is wholly inoperative to give the drawee or holder any right, as against any party thereto, either to retain the bill, to give a discharge therefor, or to enforce payment thereof. The amending section gives the drawee paying a cheque with a forged endorsement the rights of a "holder in due course" against any endorsement subsequent to the forged endorsement and against "bearer as a transferror by delivery," and any such endorser paying him is to have the same rights as against any endorser prior to him but subsequent to the forged endorsement. Section 8 introduces into our law the rules of the common law of England, including the law merchant, save in so far as they are inconsistent with the express provisions of the Act, and shall be deemed

to apply to bills, notes, and cheques, from the date on which the original Act came into force.

Chapters 18, 19 and 20 relate to the electoral franchise and procedure at elections, and are therefore of a political as well as of legal interest. The amendments to the Franchise Act are unimportant, and require no special notice. Those familiar with the working of this important measure, and especially the revising officers, have made many suggestions whereby it might be greatly simplified, and its cost reduced, but, so far, little attention has been paid to them. Some future Secretary of State may, perhaps, be more willing to deal with this important subject, and to adopt the views of those best qualified to give advice, than the present holder of that position.

Chapter 19, relating to Dominion elections, settles some disputed points as to the right of deputy returning officers and poll clerks to vote, the method of endorsing ballots, the care of ballot boxes, the procedure in case of the loss of boxes, and confers power on a judge to review the action of the returning officer. It further gives the right of appeal to a judge of the Superior Court, and the method of procedure in case of such appeal, in the event of neglect or refusal to act on the part of the judge of the County Court. The Act then goes on to deal with the difficulty which has arisen from the alleged partiality of returning officers in making their returns to the Clerk of the Crown in Chancery, and of the clerk in publishing the same, whereby it has been complained that unfair advantage has been given to one party over another in the filing of petitions. It provides that the returning officer shall make his return immediately after the six days allowed for a recount, or, where there has been a recount, immediately thereafter, to the Clerk of the Crown, who shall immediately publish the returns in the order in which they have been received. Stricter provision is made for the case of bribery by way of loan or promise of loan, or promise of office or employment, from or on behalf of any candidate for election. The method of folding ballot papers is revised, and a new schedule of fees is established.

Chapter 20 makes some very important changes in the Controverted Elections Act. The jurisdiction of the Court of Appeal for Ontario in election trials, and of the Chief Justice of Ontario in arranging the *rota*, is withdrawn, and all trials must now be held before two judges. Petitions for the trial of elections must be accompanied by an affidavit from the petitioner that he has good reason to believe, and does believe, the truth of the allegations in his petition. It is also provided that in the case of elections where no poll has been demanded, the petition must be presented not later than thirty days after the nomination, and, where a poll has been demanded, not later than forty days after the day of polling, except in cases of alleged acts of bribery after the election, in which case the petition may be presented within thirty days after the alleged commission of such acts of bribery. The object of these amendments is obviously to check the presentation of petitions, except where there are good grounds for doing so, and, *bonâ fide* intention of prosecuting them. A limitation as to counsel fees, and as to costs generally, is provided, the former not to exceed $50 and the latter $300, exclusive of witness fees. In case of the two judges before whom a

trial is conducted differing, the member shall be held to have been duly elected; but when they agree as to the election being void, but differ as to the rest of the determination, the election shall be held to be void. The most important section, however, of this Act is the 19th, which provides that when the court decides that no corrupt practice was committed by the candidate personally, that he did not connive at any corrupt acts, and took all reasonable means to prevent them, and that the offences committed were of a trivial and limited character, and that generally the election was free from corrupt practices on the part of the candidate or his agents, it shall not be declared void. This provision is in harmony with the existing law of Ontario, and will greatly mitigate the severity with which the courts have hitherto dealt with corrupt practices in Dominion elections. It does not, however, apply to cases arising out of the last election. Agents may further be compelled to pay the costs of proving corrupt practices committed without the knowledge of the candidate.

The next Act of importance is that to amend the Act respecting the North West Territories. By this the powers of the Legislative Assembly of the Territories are greatly extended, and they are, to all intents and purposes, given the same jurisdiction as the various Provincial Parliaments, except that with regard to the important subject of education their powers are subject to the same limitation as at present. The clause relating to the use of the French language is modified, as regards the proceedings of the Assembly, by the resolution adopted in the House of Commons in the session of 1890. In other respects its use remains obligatory.

The next chapter is a new Act, providing, in very comprehensive terms, for the punishment of all such cases of fraud upon the Government, by bribes to public officers, or the acceptance of bribes by them, either for the procuring of contracts or offices, or any personal benefit, or in the shape of commissions, as were proved to have taken place by the investigations of last session.

The Supreme Court Amendment Act (c. 25) alters the time of the commencement of the October term, after 1891, from the fourth to the first Tuesday in October, and amends s. 29 as to appeals in cases relating to fees of office, duty, rent, revenue, or sum of money payable to Her Majesty in the Province of Quebec. The Act further repeals s. 37, authorizing the Governor to refer matters for the opinion of the Supreme Court, and provides that such reference may be of important questions of law or fact touching provincial legislation, or the appellate jurisdiction touching educational matters vested in the Governor in Council by the B.N.A. Act, or touching the constitutionality of legislation by the Parliament of Canada, or any other matters the Governor in Council may think proper to refer to the Supreme Court for opinion; which opinion, with the reasons for the same, shall be certified to the Governor. In constitutional cases, the Attorney-General of the Province, or, in the North West Territories, the Lieutenant-Governor shall be notified of the hearing. The court may direct any person or class of persons interested in the matter to be notified, or it may request counsel to argue as to any interest, and the reasonable expenses of such counsel are to be paid by the Receiver-General. The opinion of the court, though advisory

only, shall be treated as a final judgment, so that there can be no appeal to the Queen in Council unless allowed by the Judicial Committee.

The Exchequer Court Act (c. 26) extends the jurisdiction of the court to cases of conflicting applications under the Patent Act for patents or regulations of copyright, trade marks or industrial designs, and applications to impeach or annul the same; and apparently gives the court co-ordinate jurisdiction with provincial courts where a remedy is sought respecting the infringement of any patent, copyright, trade mark or industrial design. A further jurisdiction, similar to that given the Ontario courts by R.S.O. (1887), c. 27, to the Heir and Devisee Commission, is also given to the court, under which it may decide upon the claims of parties claiming as, or through, the heir, devisee, representative, or assignee of parties entitled to unpatented public lands of Canada. Another clause gives the Attorney-General of Canada the right to apply to the court for an interpleader issue where the Crown or its officer is under liability for any debt, money, goods or chattels in respect of which the Crown or its officer may be sued or proceeded against by two or more persons making adverse claims thereto. The other clauses authorize the appointment of a judge *pro hâc vice* in certain cases, and amend the original Act in minor details.

We need not more than mention c. 33, relating to trade marks and industrial designs. The Act respecting the shipping of live stock is of interest only to cattle dealers. It is intended to remedy the evils pointed out by Mr. Plimsoll in his recent visit to this country.

Chapters 37, 38, 39, 40 and 41 all relate to the inspection of vessels, the safety of ships and cargoes, the inspection of steamboats, and certificates of masters and mates. No new principles are introduced in these Acts, with the exception of the provision for the marking of deck and load lines. The various measures are to correct defects in previous legislation which experience has found to exist.

The only remaining Act which requires our notice is one entitled "An Act respecting certain female offenders in the Province of Nova Scotia." It is an Act to give power to judges and magistrates in that Province to send a certain class of female offenders who are Roman Catholics to an institution established in the city of Halifax and known as "The Good Shepherd Reformatory and Industrial Refuge," under the control of the "Sisters of the Good Shepherd," constituted a corporation by an Act of the Provincial Legislature. The title of the institution sufficiently designates its objects, in themselves of a highly praiseworthy nature. The general provisions of the Act seem to be sufficient to secure its being properly carried out, but there is a decided defect in the want of an efficient inspection of the institution itself. We have had abundant evidence of the necessity for a close and careful inspection of all such institutions when powers are given such as are conferred by this Act. We know by experience that motives of philanthropy give no security against evils of mismanagement; and the attention of the Minister of Justice having been directed to this point, we trust that it will not be overlooked.

The list of measures above enumerated bear out, we think, the remarks made at the beginning of this article as to the voluminous and important character of the legislation of last session.

Proceedings of Law Societies.

LAW SOCIETY OF UPPER CANADA.

EASTER TERM, 1891.

(*Continued from page 586.*)

The Report of the Law School Building Committee was presented as follows:

(1) The contract for the erection of the Law Society building, signed by all the contractors and on behalf of the Society, is herewith submitted.

(2) The Committee have from time to time authorized the issue of cheques to contractors producing certificates from the architect, and up to this date cheques to the amount of $8,200 have been issued as follows:

(1) To Benjamin Brick, contractor for stone, brick, and excavation, 3 certificates	$5850
(2) J. C. Scott, carpenter work, 2 certificates	1550
(3) Pendreth & Hutton, contractors for iron work, 2 certificates	800
	$8200

(3) The architect reports that the work is proceeding satisfactorily, and that there is every prospect of the building being completed within the time stipulated for in the contract.

The report of the Legal Education Committee on the regulations for admission as solicitors or barristers, under 54 Vict., c. 25, recommending that rules for giving effect to the following regulations be forthwith passed:

REGULATIONS UNDER THE ACT 54 VICT., C. 25.

(1) *Any* person applying for a certificate of qualification to be admitted as a solicitor under the provisions of the Act 54 Vict., c. 25, shall furnish proof of—

(*a*) *That* notice of his intention to apply for such certificate, signed by a Bencher, was given to the secretary at least two months preceding the first day of the Term in which he intends to apply for such certificate;

(*b*) *That* notice of his intention as aforesaid was also published once a week, for at least two months preceding the first day of such Term, in some newspaper in the county town of the county in which such person resides;

(*c*) *That* he was duly called to the Bar prior to the first day of January, 1891, and has been in actual practice, and that he still remains a member of the Bar in good standing, and that since his call no adverse application to disbar him or otherwise to disqualify him from practice as a barrister has been sustained, and that no charge is pending against him for professional or other misconduct;

(*d*) *That* he has passed the usual examination prescribed for admission to practise as a solicitor;

(*e*) *That* he has paid the fees payable by candidates for admission to practise as solicitor.

(2) *The* notice mentioned in sub-sections (*a*) and (*b*) shall be in the following form, viz.:—

"LAW SOCIETY OF UPPER CANADA.

"Mr.....,(some Bencher) gives notice that Mr. A. B., who has been called by the Law Society to the degree of Barrister-at-Law prior to the first day of January, 1891, will next term apply to the Law Society for a certificate under the corporate seal of the society of his fitness and capacity, and that he is in all respects duly qualified to be admitted as a solicitor.

"As of.....Term, 189..

.....

(Bencher's Signature.)

(3) The secretary shall receive such notice upon payment of one dollar and shall make two lists containing the names, additions, and residences of the persons intending to apply as aforesaid, and affix one of such lists in a conspicuous place in his office and the other in Convocation Hall.

(4) The certificate to be granted shall be in the following form:

"These are to certify that Mr. A. B., who has been called by the Law Society to the degree of Barrister-at-Law prior to the first day of January, 1891, having now satisfied the society of his fitness and capacity, and that he is in all respects duly qualified to be admitted as a solicitor, may be admitted and enrolled as a solicitor in accordance with the provisions of the statutes in that behalf.

"In testimony whereof I, E. B., treasurer of the said society, have to these presents affixed the seal of the said society, at Osgoode Hall, this.....day of....., in the in the year of Our Lord one thousand eight hundred and.....and the..... year of Her Majesty's reign.

"J. H. E.,
"*Secretary.*

"E. B.,
"*Treasurer.*"

(5) The person applying for and obtaining such certificate shall pay therefor the sum of two dollars.

A rule founded on the Act 54 Vict., c. 25, and the above report, was then introduced, read a first, second, and third time, and carried.

The Secretary was directed to send a copy to every barrister entitled to apply under the provisions of the above.

The joint report of the Finance and Legal Education Committees, as to Law School fees, was then presented.

Ordered, that the fees payable by students for attendance upon lectures in the Law School be increased to twenty-five dollars a year, and that such amendments to existing rules as may be necessary to give immediate effect to such increase be made.

The Select Committee on Honors and Scholarships reported as follows:

(1) That the following candidates passed their second year's examination with Honors, namely, Messrs. C. H. Barker, S. Johnston, J. H. Moss, J. E. Jeffrey, R. M. Lett, W. Cross, M. J. O'Connor, and J. G. Smith.

(2) That Mr. Barker is entitled to a scholarship of $100; Mr. Johnston to a scholarship of $60; and Messrs. Moss, Jeffrey, Lett, Cross, and O'Connor to a scholarship of $40 each.

(3) That the following candidates passed their first year's examination with honors, namely, Messrs. J. C. Haight, W. E. Woodruff, and W. A. Fraser.

(4) That Mr. Haight is entitled to a scholarship of $100; Mr. Woodruff to a scholarship of $60; and Mr. Fraser to a scholarship of $40.

The report was read and adopted, and payments ordered to be made thereon.

Mr. Lash gave notice that he would next Term move to introduce a rule repealing Rule 201 of the rules of the 8th June, 1889, substituting therefor the following, to take effect from and after the first day of May, 1891, viz.:

(201) Of the candidates passed with honors at each intermediate examination or Law School examination, allowed in lieu thereof, the first shall be entitled to a scholarship of $100, the second to a scholarship of $60, and the next five to a scholarship of $40 each; and that each scholar shall receive a diploma certifying to the fact.

Also, that Rule 204 of said rules be repealed and the following be substituted therefor, to take effect from the first day of May, 1891, viz.:

(204) Of persons called with honors, the first six shall be entitled to medals on the following conditions:

The first, if he has passed both the intermediate examinations or Law School examinations, allowed in lieu thereof, to a gold medal, otherwise to a silver medal;

The next two, if they have passed both intermediate examinations or Law School examinations, allowed in lieu thereof with honors, to a silver medal each, otherwise to a bronze medal;

The next three, if they have passed both intermediate examinations or Law School examinations, allowed in lieu thereof with honors to a bronze medal each.

On motion duly made, ordered that Rule 65, page 19, be amended by inserting after the word "Toronto," on the last line but one of page 19, the words "or other bank duly authorized by the Finance Committee."

The rule as to stages was suspended, and the rule as amended was read three times and carried.

Mr. Martin moved that Rule 156 be amended by adding thereto as follows:

(156) (*a*) Any Student-at-Law or Articled Clerk, not being a graduate, who is under Rule 156 subject to attend the school for three years, may at his option take the first year of his course during the first or second year of his attendance or service by giving notice of his intention to the Principal at least one week before the commencement of the session.

Carried.

The rule as to stages having been suspended, the rule was read a first, second, and third time, and passed.

Ordered, that two hundred copies of Mr. Reeve's report of 18th May, 1891, be printed and sent to judges, benchers, and County Law Association.

STATEMENT OF REVENUE AND EXPENDITURE OF THE LAW SOCIETY

FOR THE YEAR ENDING 31ST DECEMBER, 1890.

REVENUE.

Certificate and Term Fees	$23,611 31	
Arrears, Fines, and Costs collected	1,219 50	
	24,830 81	
Less Fees returned	135 50	
		$24,695 31

Notice Fees		$379 00
Attorneys' Examination Fees	$6,820 00	
Less Fees returned	150 00	
		6,670 00
Students' Admission Fees	3,610 00	
Less Fees returned	320 00	
		3,290 00
Call Fees	11,265 00	
Less Fees returned	525 00	
		10,740 00
Interest and Dividends		4,443 71
Law School Fees	1,640 00	
Less Fees returned	30 00	
		1,610 00
Reporting—Rowsell & Hutchison, for Reports sold		1,438 13
Fees on Petitions, Diplomas, etc		135 00
Fines, Lending Library		13 10
Law Costs—Deposit, *Re* Hand, returned		400 00
Telephone Office, collected for Commission and Messages		102 83
Balance, being excess of expenditure		4,653 52
		$58,570 60

EXPENDITURE.

REPORTING :—			
Salaries, thirteen months		$10,658 16	
Insurance on Reports at Rowsell & Hutchison's		90 00	
Printing as per contract, including $1,250 paid on 31st December, 1890, instead of on 1st January as heretofore		8,725 49	
Notes for *Law Journal*	$215 21		
Notes for *Law Times*	231 45		
		446 66	
			$19,920 31
LAW SCHOOL :—			
Salaries, thirteen months		9,166 53	
Scholarships		720 00	
Printing Curriculum in *Law Journal*		50 00	
Stationery and Printing		210 25	
Furniture		215 00	
Extra Attendance (Gilly)		102 66	
			10,464 44
EXAMINATIONS :—			
Salaries—Proportion of Examiners' Salaries in respect of Old Curriculum		708 30	
Printing and Stationery		210 00	
Advertising Curriculum in *Law Journal*		50 00	
Examiners for Matriculation, Hilary Term, 1890		82 00	
Medals		54 51	
			1,104 81
LIBRARY :—			
Books, Reports, and Periodicals		2,568 53	
Binding and Repairs		411 11	
			2,979 64
COUNTY LIBRARY AID :—			
Brant		$ 84 83	
Bruce		25 20	
Carleton		288 92	
Essex		578 50	
Frontenac		46 00	
Hamilton		383 48	
Leeds and Grenville		660 00	
Lindsay		70 00	
Middlesex		405 00	
Norfolk		155 00	

Perth	$ 71 00	
Peterboro	475 00	
Welland	40 00	
Wellington	71 00	
York	814 00	
Reports on County Libraries	7 92	
J. Winchester, for inspecting	300 00	
		$4,475 85
GENERAL EXPENSES :—		
Salaries to 31st December, 1890—		
Secretary and Librarian, thirteen months	2,166 67	
Assistants, " "	2,106 59	
Auditor, " "	108 33	
Housekeeper " "	568 75	
		4,950 34
Lighting, Heating, and Water—		
Gas	258 74	
Water	72 70	
Incandescent Lighting	91 48	
Gas Stove	30 80	
Fuel	160 75	
Repairs to Apparatus, Gas, Steam, and Water Pipes	45 17	
Government Lighting and Heating, during 1888-89	850 00	
" " " " 1889-90	1,070 00	
		2,579 64
Insurance—increased amount, three years' premium		160 00
Grounds—		
Gardener	386 00	
Tools, and sharpening same	2 00	
Cartage	5 00	
Labor, thirteen months	392 00	
Snow clearing	29 13	
Sodding, Plants, and Flowers	74 35	
		888 48
ADDITIONS, ALTERATIONS, AND REPAIRS :—		
As per Schedule A		6,768 21
PRINTING, ADVERTISING, AND STATIONERY :—		
Advertising	194 60	
Stationery	123 96	
Printing	207 40	
		525 96
LAW COSTS :—		
Solicitor's allowance, thirteen months	325 00	
Lount & Marsh, Counsel Fees—		
McDonel *v.* Law Society $		
McDougall *v.* Law Society		
	435 00	
Walter Read, Taxed Costs, Miscellaneous	79 21	
Paid Defendants' Costs, Law Society *v.* McDougall	486 06	
Stenographer for use Discipline Committee	78 85	
		1,404 12
TELEPHONE OFFICE :—		
Rent	100 00	
Salary, thirteen months	453 00	
Messenger, " "	130 00	
		683 00
SUNDRIES :—		
Mr. Hardy—		
1890 { Legal Chart	100 00	
1890 { Law List	100 00	
1891—Legal Chart	100 00	
		300 00

Portrait of Sir W. Campbell		$290 00
Term Lunches		727 02
Postages		116 78
Telegrams		4 50
Resumé		25 00
Oiling Floor, $8.40; Moving Pictures, $18	$26 40	
Laying Carpets, $6.15; Pails and Brooms, $13.10; Cleaning Chimneys, $3.35	22 60	
Soap, $34.93; Dusting Books, $18; Copy of Inventory and Catalogue, $9.06	61 99	
Lock and Keys, etc., $7.30; Petty Expenses, $12.71	20 01	
Ice, two seasons	46 50	
Gratuity to Postman, $5; Guarantee Premium, $20	25 00	
		202 50
		$58,570 60

Audited and found correct,

HENRY WM. EDDIS, F.C.A.,

Auditor.

SCHEDULE A.

DETAILS OF ADDITIONS, ALTERATIONS, AND REPAIRS.

LAW SCHOOL—Students' Rooms :—		
Douglas & Co., sheet iron work	$ 88 67	
O'Connor, painting and glazing	246 67	
Rundle, plastering	136 27	
Dudley & Scott, carpentering	291 03	
Duthie, deck roof	28 33	
Bennett & Wright, steam fitting	172 10	
Brick, brick work	83 07	
		$1,046 14
CONSULTATION ROOMS :—		
Douglas & Co., sheet iron work	44 33	
O'Connor, painting and glazing	123 00	
Rundle, plastering	68 13	
Dudley & Scott, carpentering	145 51	
Duthie, deck roof	14 17	
Bennett & Wright, steam fitting	86 23	
Brick, brick work	41 33	
		522 70
FIRE PROTECTION :—		
Nicholls, fire escape	318 22	
Pim, iron doors	180 00	
O'Connor, painting, etc	15 18	
Brick, building up door and window	51 40	
Bennett & Wright, water service and electric alarm	670 00	
		1,234 80
EAST WING :—		
O'Connor, external repairing and painting, including roof		1,087 35
Furniture, including carpet and wardrobes		1,171 91
Architect, Mr. Storm's fees for the year		301 78
ELECTRIC LIGHT IN LIBRARY :—		
Nicholls, putting in apparatus		935 00
LIBRARY IMPROVEMENTS :—		
Rundle, plaster work	54 40	
Scott, carpenter work	78 21	
O'Connor, painting, etc	171 95	
		304 56

BENCHERS' ROOM :—

O'Connor, calsomining		$ 30 80

GENERAL REPAIRS :—

Tennant, carpenter work	$56 45	
Bryce, repairs to asphalt floor in area	20 00	
Pim, one new iron gate	30 00	
" repairing old gates	17 50	
" " railings	5 00	
Maguire & Bird, gasfitting and plumbing	11 45	
		140 40
		$6,775 44
Less Cheque No. 1526 cancelled		7 23
		$6,768 21

NOTE.

Total Expenditure		$58,570 60
The following items which are of an exceptional character, namely :—		
Proportion of insurance chargeable in 1891 and 1892	$ 53 00	
Permanent improvements, $6,768 21 (see Schedule A.), less ordinary repairs, $1,000	5,768 21	
Reporters' salaries, payment made Dec. 31, '90, instead of Jan. 1, '91, as formerly	960 31	
Printing Reports, " " " " " " "	1,250 00	
Law School, " " " " " " "	705 11	
General Salaries, " " " " " " "	380 79	
Labor, " " " " " " "	30 15	
Solicitor, " " " " " " "	25 09	
Telephone salaries, " " " " " " "	44 80	
Chart, " " "	100 00	
Government heating for the year 1889	850 00	
		10,167 37
Expenditure, less items of exceptional character		$48,403 23
Revenue for year	53,917 08	
Ordinary Expenditure for year	48,403 23	
Balance of Revenue of 1890 over ordinary expenditure of 1890	$ 5,513 85	

Early Notes of Canadian Cases.

EXCHEQUER COURT OF CANADA.

BURBIDGE, J.] [Nov. 28.

MORIN *v.* THE QUEEN.

Government railway—Damage to farm from overflow of boundary ditches—Obligation to maintain same.

The Crown is under no obligation to repair or keep open the boundary ditches between farms crossed by the Intercolonial Railway in the Province of Quebec.

Choquette and *Belcourt* for plaintiff.

Hogg, Q.C., and *Angers*, Q.C., for defendant.

MAYES *v.* THE QUEEN.

Contract for the construction of a public work—Delay in exercising Crown's right to inspect materials—Independent promise by Crown's servant, effect of—Government Railways Act, 1881.

It was a term in suppliant's contract with the Crown for the construction of a public work that certain timber required in such construction should be treated in a special manner, to the satisfaction of the proper officer in that behalf of the Department of Railways and Canals. By another term of the contract, it was declared that the express covenants and agreements contained therein should be the only ones upon which any rights against the Crown should be founded by the suppliant.

The suppliant, immediately upon entering upon the execution of his contract, notified A., the proper officer of the Department in that behalf, that he intended to procure the timber at a certain place and have it treated there in the manner specified before shipment. A. approved of the suppliant's proposal, and promised to appoint a suitable person to inspect the timber at such place within a given time. The inspector was not appointed until a long time after the period so limited had expired, and by reason of such delay the suppliant had to pay a higher rate of freight on the timber than he otherwise would have had to pay, and was compelled to carry on his work in more unfavorable weather and at greater cost, for which he claimed damages.

Held, on demurrer to the petition, that the Crown was not bound under the contract to have made the inspection at any particular place, and that in view of the 98th section of the Government Railways Act, 1881, and the express terms of the contract, A. had no power to vary or add to its terms, or to bind the Crown by any new promise.

The suppliant's contract contained the following clause: "The contractor shall not have or make any claim or demand, or bring any action, or suit, or petition against Her Majesty for any damage which he may sustain by reason of any delay in the progress of the work *arising from the acts of any of Her Majesty's agents*; and it is agreed that, in the event of any such delay, the contractor shall have such further time for the completion of the work as may be fixed in that behalf by the Minister."

Held, that this cause covered delay by the Government's engineer in causing an inspection to be made of certain material, whereby the suppliant suffered loss.

Pugsley, Q.C., for suppliant.

W. B. A. Ritchie for respondent.

[December 9.

SMITH & PATTERSON, *v.* THE QUEEN.

Customs duties—The Customs Act, R.S.C., c. 32, ss. 58, 59, 65; 51 Vict., c. 14, s. 15—52 Vict., c. 14, s. 6—Market value—Value for duty—Costs.

The rule for determining the value for duty of goods imported into Canada prescribed by the 58th and 59th sections of the Customs Act (R.S.C., c. 32) is not one that can be universally applied.

When the goods imported have no market value in the usual and ordinary commercial acceptation of the term in the country of their production or manufacture, or where they have no such value for home consumption, their value for duty may be determined by reference to the fair market value for home consumption of like goods sold under like conditions.

The Vacuum Oil Co. v. *The Queen* (2 Ex.C.R. 234) referred to.

The goods in question in this case were part of a job lot of discontinued watch-cases, and at the time of their sale were not being bought and sold in the markets of the United States. They could be purchased for sale or use there,

but only at published prices which were greater than any one would pay for them.

The claimants bought the goods for export at their fair value, being about half such published prices. They let their agent in Canada know the prices paid, but withheld from him the fact that the purchase was made on the condition that the goods were to be exported. The agent, without intending to deceive the Customs appraiser, represented that the prices were those at which the goods could be had in the United States when purchased for home consumption. This representation was untrue. On the question of the alleged undervaluation the court found for the claimants, but, because of such misrepresentation, without costs.

Greenshields, Q.C., and *R. C. A. Greenshields*, for claimants.

Osler, Q.C., and *Hogg*, Q.C., for respondent.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

GALT, C.J.] [Oct. 12.

IN RE COE *v.* COE

Prohibition—Division Court—Appeal to, from magistrate's order, under 51 Vict., c. 23—Notice of appeal—"Cause or matter"—Amendment.

By s. 15 of R.S.O., c. 139, which by s. 11 of 51 Vict., c. 23, is to regulate appeals to Division Courts from magistrate's orders for payment of maintenance moneys by husbands to wives, it is provided that the appellant shall give to the opposite party a notice in writing of his appeal, and of the cause or matter thereof, eight days, at least, before the holding of the court at which the appeal is to be heard.

Where a notice of appeal was given in time, but did not state any "cause or matter" of the appeal,

Held, on a motion for prohibition, that the judge presiding at the Division Court had no power to allow the notice to be amended.

E. A. Forster for the plaintiff.

Douglas Armour for the defendant.

Div'l Court.] [Nov. 25

IN RE LILLEY AND ALLIN.

Mandamus—Revising officer—Electoral Franchise Act, R.S.C., c. 5, ss. 19, 33—Notice of objection of names on voters' list—Grounds of objection—"Not qualified"—Validity of notice—Ruling of revising officer upon—Appeal to county judge.

A notice under s. 19 of the Electoral Franchise Act, R.S.C., c. 5, as amended by 52 Vict., c. 9, s. 4, to a person whose name was objected to, for the purpose of having the name taken off the voters' list at the final revision, simply gave "not qualified" as the ground of objection.

Held, sufficient.

The revising officer (who was not a judge), having ruled that the notice was valid, the person whose name was objected to appealed from that ruling to the county judge, who held that the notice was invalid, and the revising officer thereupon refused to go on and hear the complaint.

Held, that no appeal was given by s. 33 of the Act from the revising officer's ruling; and therefore the proceedings before the county judge were *coram non judice.*

Held, also, that the remedy for a person whose application the revising officer refuses to consider is by mandamus and not by appeal to the county judge.

Re Marter and Gravenhurst, 18 O.R. 243, distinguished.

Aylesworth, Q.C., and *Gibbons*, Q.C., for Frank W. Lilley.

Hellmuth for Lewis Allin.

C. J. Holman for the revising officer.

Chancery Division.

BOYD, C.] [Oct. 20.

RE ALGER AND THE SARNIA OIL CO.

Sale without reserve—Sale by tender—Reception of tenders—"Peremptorily closed"—Extending the time—Accepting last in, but highest.

A sale without reserve means that the vendor will not bid, nor any one on his behalf, and the property will be sold to the highest bidder.

A sale by tender (not saying to the highest bidder) is a mere attempt to ascertain whether an offer can be obtained within such a margin as the seller is willing to adopt.

Tenders were advertised for, to be received by a certain time, when the sale was to be "peremptorily closed." At the time fixed one tender only was in, and the referee enlarged the time for the arrival of a train which was late. Two more tenders were received by that train and all three were opened, when a fourth was handed in by a party present. The referee instructed notice to be given to the other tenderers, and on a subsequent day accepted the last, which was the highest.

Held, that he was right in so doing.

Meredith, Q.C., for Englehart, an appellant.

Hoyles, Q.C., for Nesbett, an appellant.

E. R. Cameron for the vendors.

D. MacMillan for the liquidator.

Practice.

BOYD, C.] [October 14.

PRICE *v.* WADE.

Judgment—Application for leave to issue execution on judgment more than twenty years old —Statute of Limitations—R.S.O., c. 60, s. 1—Rule 886—"Issue"—"Action."

The limit of twenty years being fixed by R.S.O., c. 60, s. 1, after which, in the absence of payment or acknowledgment, an action cannot be brought upon a judgment, the analogy of the statute applies to applications for leave to issue execution after the lapse of twenty years from the date of the judgment or the return of the last execution.

An issue, directed under Rule 886, to try the question of liability upon a judgment more than twenty years old is an action within the meaning of R.S.O., c. 60, s. 1, and the Statute of Limitations would be a good defence.

W. M. Douglas for the administrator of the plaintiff.

Hoyles, Q.C., for the defendant.

Q.B. Div'l Court.] [Nov. 28.

WALKER *v.* DICKSON.

Indemnity—Question between co-defendants—Order directing determination of—Rule 328 —Pleading—Notice of trial.

Rule 328 is applicable where a defendant claims indemnity or relief over against a co-defendant.

And where such a claim was made against a co-defendant who had not appeared or defended the plaintiff's claims,

Held, that an order was properly made for the trial of the question between the co-defendants at the same time and place as the plaintiff's claim, notwithstanding that the time for pleading to the claim for relief over had not expired, and that it was at the date of the order too late to give the usual ten days' notice of trial.

C. W. Kerr for the defendant Rogers.

G. B. Gordon for the defendant Milburn.

STREET, J.] [Nov. 30.

WAIT *v.* SAGER.

Creditors' Relief Act—R.S.O., c. 65, s. 4, s.-s. 3—Sheriff's interpleader — Claim by chattel mortgagee—Claimant abandoning—Rights of claimant under execution subsequently obtained.

Certain goods of the defendant seized by a sheriff under the plaintiffs' execution were claimed by a chattel mortgagee, whereupon an interpleader issue was directed. The goods were sold under the interpleader order by the sheriff, who deducted his fees from the proceeds, and by consent retained the residue in his hands pending the result of the issue, and entered it as held under the Creditors' Relief Act. The claimant never delivered any issue and abandoned the interpleader proceedings. He obtained judgment against the defendant, and about six weeks after the making of the interpleader order placed an execution in the sheriff's hands.

The plaintiffs contended that the claimant should not be allowed to participate as an execution creditor in the proceeds of the goods.

Held, that he should not be barred of his rights as an execution creditor, because before he had attained that status he had asserted a right in a different capacity.

Whatever might have been the effect, had his claim been insisted upon, of s. 4, s-s. 3, of the Creditors' Relief Act, R.S.O., c. 65, none should follow the fact that a claim was made and abandoned before it became necessary to contest it.

A. H. Baird for the plaintiffs.

A. D. Hardy for the sheriff.

Heyd for the claimant.

ARMOUR, C.J.] [December 12.

STANDARD BANK *v.* FRIND & CO.

Partnership—Judgment against firm—Execution against alleged partner—Rules 756, 876—Method of determining liability.

Where an application is made under Rule 876 for leave to issue execution, upon a judgment against a firm, against an alleged member of the firm, who has not admitted that he was and has not been adjudged to be a partner, and who was not served as a partner with the writ of summons, and who disputes his liability, there is no power in the court or a judge, under Rule 756 or otherwise, to summarily determine the question of his liability; but an issue must be directed.

Tennant v. *Manhard*, 12 P.R. 619, overruled.

A. H. Marsh, Q.C., for the plaintiffs.

S. King for Paul Frind.

DIVISION COURTS SITTINGS

IN TORONTO, FOR 1892.

1st Division: A. McLean Howard, Clerk.

TUESDAYS.

January	5,	12,	19,	26	
February	2,	9,	16,	23	
March	1,	8,	15,	22,	29
April	5,	12,	19,	26	
May	3,	10,	17,	25,	31
June	7,	14,	21,	28	
July	5,	12,	19,	26	
September	6,	13,	20,	27	
October	4,	11,	18,	25	
November	1,	8,	15,	22,	29
December	6,	13,	20,	27	

10th Division: E. H. Duggan, Clerk.

THURSDAYS.

January	7,	14,	21,	28	
February	4,	11,	18,	25	
March	3,	10,	17,	24,	31
April	7,	14,	21,	28	
May	5,	12,	19,	26	
June	2,	9,	16,	23,	30
July	7,	14,	21,	28	
September	8,	15,	22,	29	
October	6,	13,	20,	27	
November	3,	10,	17,	24	
December	1,	8,	15,	22,	29

JURY CASES

FIRST DIVISION.

Wednesday,	24th February.
"	27th April.
"	22nd June.
"	21st September.
"	23rd November.

TENTH DIVISION.

Friday,	26th February.
"	29th April.
"	24th June.
"	23rd September.
"	25th November.

JUDGMENT SUMMONSES

Will be heard as follows: 1st Division, Mondays at 10 a.m.; 10th Division at 2 p.m., on January 18th, February 15th, March 14th, April 11th, May 9th, June 6th, July 4th, September 12th, October 10th, November 7th, December 5th.

Judges Chambers are held every Monday at 10 a.m.

WINTER ASSIZES.

Ottawa (civil and criminal), before Rose, J., Tuesday, 5th January, 1892.

London (civil cases only), before Armour, C.J., Wednesday, 6th January, 1892.

Hamilton (civil cases only), before MacMahon, J., Wednesday, 6th January, 1892.

Toronto (criminal), before Street, J., Wednesday, 6th January, 1892.

Toronto (civil), before Street, J., Wednesday, 13th January, 1892.

(It is expected that Street, J., will take the new list only, and that Boyd, C., will try the non-jury remanets.)

COUNTY OF YORK LAW ASSOCIATION LIBRARY.

Latest additions:

Byles (Rt. Hon. Sir J.), Bills of Exchange, etc., 15th ed., London, 1891.

Fisher (J.R.), and Strachan, (J.A.), The Law of the Press, London, 1891.

Garrett (E.W.), The Law of Nuisances, London, 1890.

Index to the Journals of the Legislative Assembly, 1852 to 1866.

Mews (J.), Criminal Law Digest, London, 1884.

Pope (H. M. R.), The Law and Practice of Lunacy, 2nd ed., London, 1890.

Russell (F.), The Law of Submissions and Awards, 7th ed., London, 1891.

Sessional Papers of the Dominion Parliament for 1891, 3 vols.

Short (F.H.), and Mellor (F.H.), Practice of the Crown Side of the Q.B.D., London, 1890.

Stephens (H.), The Law of Malicious Prosecutions, Philadelphia, 1889.

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